DOCKET

No. 87-6-CFY
Status: GRANTED

Title: Guy Rufus Huddleston, Petitioner
v.
United States

Docketed:
June 27, 1987

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Ferris Jr.,Donald W.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 27 1987	G	Petition for writ of certiorari filed.
3	Jul 30 1987		Order extending time to file response to petition until August 29, 1987.
4	Aug 28 1987		Order further extending time to file response to petition until September 11, 1987.
5	Sep 11 1987		Brief of respondent United States in opposition filed.
6	Sep 16 1987		DISTRIBUTED. October 9, 1987
7	Oct 13 1987		Petition GRANTED.
			**********
9	Dec 9 1987		Order extending time to file brief of petitioner on the merits until December 18, 1987.
10	Dec 14 1987		Order further extending time to file brief of petitioner on the merits until December 23, 1987.
11	Dec 23 1987		Joint appendix filed.
12	Dec 23 1987		Brief of petitioner Guy R. Huddleston filed.
13	Dec 29 1987		Record filed.
		*	Certified copy of C. A. proceedings received.
14	Jan 4 1988		Record filed.
		*	Certified copy of original record received.
16	Jan 27 1988		Order extending time to file brief of respondent on the merits until February 8, 1988.
18	Feb 5 1988		SET FOR ARGUMENT, Wednesday, March 23, 1988. (2nd case).
17	Feb 8 1988		Brief of respondent United States filed.
19	Feb 23 1988		CIRCULATED.
20	Mar 7 1988	X	Reply brief of petitioner Guy R. Huddleston filed.
21	Mar 23 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87 - 6

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

GUY RUFUS HUDDLESTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. What should be the federal standard for admitting evidence of prior bad acts under Fed. R. Evid. 404(b) — must the government prove by "clear and convincing" evidence that the defendant engaged in the prior bad act, as is required in the Seventh, Eighth, Ninth, and D.C. Circuit Courts of Appeals; or instead prove only by a "preponderance of the evidence" that the defendant performed the act, as is required by the Second, Fourth, Fifth, and Eleventh (and now the Sixth) Circuits?

2. Which standard of harmless error should apply to the erroneous admission of prior bad acts evidence — the "harmless beyond a reasonable doubt" standard, or the "effect on substantial rights" test?

3. Whether the District Court abused its discretion in admitting evidence of the prior similar acts in question here, and whether admission of such evidence was harmless?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Guy Rufus Huddleston, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion on Petition for Rehearing of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished order of the Sixth Circuit Court of Appeals Staying the Mandate entered on June 1, 1987, is attached as Appendix A. The unpublished Order of the Sixth Circuit Court of Appeals Denying Appellant's Petition for Rehearing En Banc entered on April 30, 1987, is attached as Appendix B. The Opinion of the Sixth Circuit Court of Appeals granting the Government's Petition for Rehearing, Vacating the Decision of October 8, 1986, and Affirming Judgment of Conviction is not yet reported, and is attached as Appendix C. The Opinion of the Sixth Circuit Court of Appeals Reversing Judgment of Conviction and Remanding the Case is reported at 802 F.2d 874 (6th Cir. 1986), and is attached as Appendix D. The Judgment of Acquittal of Count I and Conviction of Count II of the United States District Court for the Eastern District of Michigan is attached as Appendix E.

JURISDICTION

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit Granting the Government's Petition for Rehearing, Vacating the Decision of October 8, 1986, and Affirming the Judgment of Conviction was entered on February 20, 1987. The Order Denying Appellant's Petition for Rehearing En Banc was entered on April 30, 1987. This Petition for Certiorari is within sixty days of that date as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

RULE OF EVIDENCE INVOLVED

Rule 404(b) of the Federal Rules of Evidence provides:

"*Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissable to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

STATEMENT OF CASE

Petitioner Guy Rufus Huddleston was convicted by a jury of one count of a two count indictment. He was convicted of 18 U.S.C.§659 for possessing 500 stolen blank video tapes on April 23 to 25, 1985. He was acquitted of selling 4,000 stolen blank VHS tapes on April 19, 1985, which is an offense under 18 U.S.C §2315. The issue at trial as to both counts was whether Huddleston knew the tapes which he sold and possessed were stolen.

On April 15, 1985, a semi-trailer containing 32,448 blank VHS tapes was stolen from a freight yard in suburban Chicago. They were destined for a K-Mart store in Michigan, which was paying $4.69 per tape. According to Karen Curry, an employee of a rent-to-own store owned by Michigan attorney Alphonse Lewis, Petitioner Huddleston told her on April 17 that he had purchased some blank VHS tapes directly from the manufacturer in Chicago for $1 per tape. Huddleston denied that he told Curry this, testifying that he told her he was acting as a middleman for a man named Wesby.

Huddleston and Curry agree that he told her that the tapes were not stolen, and that he wanted her to arrange sales to area retailers in no less than 500 tape lots at $2.75 to $3.00 per tape. Before she did so, she checked with the Ypsilanti Police Department to determine if the tapes were stolen. She was told that the police teletype contained nothing indicating that the tapes were stolen. During the next week she periodically rechecked with the

police, but was always told that they had no report of the tapes being stolen.

She arranged for Huddleston to sell 4,000 tapes to Curtis Mathis on April 19, and 500 tapes to New York Video World, and 500 to Movieland on April 25. There was no evidence to indicate that Huddleston ever possessed any other tapes than these, except for 1500 which he attested he sold to Aspen Records in Detroit. Curry testified that Huddleston used his own name in every transaction, and instructed her that he would take care of problems with defects; she therefore told customers that defective tapes could be returned to her store. The purchasers of the tapes attested that Huddleston gave them receipts, and that they thought that the deals were legitimate, even at $3 per tape.

After the last sale, Curry was contacted by the FBI, and was told the tapes were stolen. She was instructed not to tell Huddleston, and she did not. Conversely, Huddleston never indicated in any way to Curry that he knew the tapes were stolen.

As was stated, the sole issue at trial was whether appellant Huddleston knew the tapes which he sold and possessed were stolen. The issue was a hotly contested one, and the case was close, as is evidenced by the jury deliberating for two days, and acquitting Huddleston of the April 19 charge, but convicting him of the April 25 charge.

In order to buttress their contention that Huddleston knew the tapes were stolen, at the outset of the trial the government made a motion *in limine* to introduce evidence of both prior and subsequent similar acts, pursuant to Fed. R. Evid. 404(b). The government stated that it intended to present evidence of three similar acts: 1) that a month prior to the VHS tape sales, Huddleston sold 40 twelve inch black and white television sets to Paul Toney for $28 each; 2) that shortly after the sale of the tapes, he talked to FBI undercover agent Robert Nelson about selling either 1,000 VHS movies at $15.70 per tape (according to Huddleston), or 10,000 such tapes at $1.57 each (according to Nelson), and about selling Zenith 19" color television sets at

$200 each; and 3) that he attempted to sell to Nelson Amana refrigerators, ranges and icemakers on May 2, 1985. The latter were part of an interstate shipment which had been stolen on April 30, 1985. Huddleston objected to the introduction of such testimony at the time of the motion. The trial court then asked defense counsel what his defense would be. When the court learned that it would be lack of knowledge, the court unequivocally ruled that such evidence would be admitted because it had "clear relevance" to the question of whether Huddleston knew the tapes were stolen. The court did not take the matter under advisement in order to see how the evidence would break, nor did the court indicate in any way that it would change its ruling upon objection at trial. Defense counsel did not renew his objection when each of the similar acts were admitted. The trial court did give the standard limiting instruction concerning the use of such evidence at the end of the trial, but gave no such cautionary instruction at the time of admission (nor was the court requested to do so by defense counsel.)

Consequently, much of the government's case focused on the similar acts evidence, and the defense in turn, spent much of their case testifying about the televisions, refrigerators, and movie tapes. As to the subsequent dealings between Huddleston and agent Nelson, Nelson testified that Huddleston admitted to him that some of the items (Amana appliances, color televisions, and movies) "were hot and some were not". Huddleston denied ever telling Nelson that any of the merchandise was hot. (In both opinions of the Sixth Circuit Court of Appeals, the Court was under the misimpression that a transcript of a body wire was admitted into evidence, "confirming" the testimony of the FBI agent. Such is not the case. Neither the transcript nor the tape was admitted into evidence because of the unintelligibility of the wire. The jury was instead left with making a credibility decision between Nelson and Huddleston.)

As to the black and white televisions, Huddleston called attorney Lewis who testified in detail that he bought 500 of the sets from Leroy Wesby after thoroughly investigating him, and

getting a bill of lading for the sets. Lewis did not produce the bill of lading at the trial. Lewis paid Huddleston a finder's fee for being the middleman of the sale. Curry in turn testified that Lewis sold these 500 sets for $28 a piece *right out of his store in Ypsilanti*. The 40 sets that Huddleston sold Toney for the same $28 price were from the same 770 sets that Wesby had for sale.

On appeal, the United States Court of Appeals for the Sixth Circuit reversed Petitioner's conviction on October 8, 1986, reported at 802 F.2d 874 (Nelson, J., dissenting), holding that evidence of the prior similar transaction by Huddleston involving the black and white televisions should not have been admitted under Fed. R. Evid. 404(b) because the government did not prove by clear and convincing evidence that the televisions were stolen. The court stated in footnote 5 that "the government's only support for the assertion that the televisions were stolen was the appellant's failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price." 802 F.2d 874, 876. Unlike the tapes and the Amana appliances, the government presented no evidence as to the origin of these televisions. They did not even attempt to show that the sets were stolen from an interstate shipment.

The court held that the trial court abused its discretion in admitting evidence concerning the sale of the televisions, reasoning that the government should not have been allowed to present such misconduct evidence when it could not show that there was any misconduct as to the televisions. The sale of the televisions therefore had no proper probative value, and consequently, the prejudicial effect of the admission of the sale of the televisions outweighed the nullity. In reversing, the court held that the admission of the evidence affected Huddleston's "substantial rights" under Fed. R. Crim. P. 52(b), and was not harmless beyond a reasonable doubt. Ibid. at 877.

The government petitioned the court for rehearing and suggested a rehearing *en banc*, arguing that the court's decision was inconsistent with the decision of another panel of the Sixth Circuit Court of Appeals issued one month earlier in *United*

States v *Ebens*, 800 F.2d 1422 (6th Cir. 1986). The court granted the petition, and by amended opinion dated February 20, 1987, vacated its earlier decision, ruling that the clear and convincing evidence standard does not govern the admissibility of "similar acts" evidence under Fed. R. Evid. 404(b) in the Sixth Circuit. It instead applied the "preponderance of the evidence" standard applied in *Ebens*, and found under that reduced standard that the district court did not abuse its discretion in admitting evidence of the television sets. The court further ruled that even if the trial court erred in letting the jury hear about the televisions, such err did not "substantially sway the judgment". It found that the "harmless beyond a reasonable doubt" standard announced in *Chapman* v *State of California*, 386 U.S. 18 (1967) was not applicable to a similar acts evidence ruling because it was not of constitutional magnitude.

Huddleston timely filed a petition for *en banc* reconsideration of the amended opinion. That petition was denied by order dated April 30, 1987. His Motion for Stay of the Mandate pending timely Petition for Writ of Certiorari was granted on June 1, 1987.

REASONS FOR GRANTING THE PETITION

A. THIS COURT SHOULD ADOPT THE CLEAR AND CONVINCING EVIDENCE STANDARD FOR ADMITTING PRIOR BAD ACTS UNDER FED. R. EVID. 404(b). HOWEVER, EVEN UNDER THE PREPONDERANCE STANDARD, THE GOVERNMENT FAILED TO SHOW THAT THE TELEVISIONS WHICH WERE THE SUBJECT OF THE PRIOR SIMILAR ACTS WERE STOLEN.

The Sixth Circuit recognized in its earlier opinion here in footnote 5 that "the government's only support for the assertion that the televisions were stolen was the appellant's failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price". 802 F.2d 874, 876. Unlike the tapes and the Amana appliances, the government presented no evidence as to the origin of these televisions. They did not even attempt to show

that the sets were stolen from an interstate shipment. It is little wonder that the court found that the government did not present "clear and convincing proof" that the TV's were stolen. The panel reasoned that the government should not have been allowed to present such misconduct evidence when it could not show that there was any misconduct with regard to the televisions.

In light of this lack of evidence, Petitioner respectfully submits that even under the preponderance of the evidence standard which the Sixth Circuit adopted on rehearing, evidence of the televisions should not have been admitted. A lack of a bill of lading and the relatively low price of the small black and white televisions does not outweigh the testimony of attorney Lewis that he had a bill of lading, that he sold the 500 sets right out of his store, and the fact the government presented (and has) no evidence as to the origins of the televisions. Thus, under either standard, the jury should not have been told about the televisions.

However, in view of the Sixth Circuit's amended decision, Petitioner cannot count on this Court finding that the government did not meet the lesser standard of proof. In such case, the standard of proof is critical to Huddleston's Petition. He urges this Court to adopt the "clear and convincing" standard which the Sixth Circuit did here in its first opinion, and which the Seventh, Eight, Ninth, and D.C. Courts of Appeals have adopted.

On rehearing, the Sixth Circuit enunciated three reasons for rejecting the higher standard: 1) Another panel of the court applied the preponderance standard three weeks before the initial dec sion here. *United States* v *Ebens, supra*. 2) The decisions of the circuits which have adopted the preponderance standard are better reasoned than the decisions of the circuits which follow the clear and convincing standard. 3) The clear and convincing standard was initially adopted prior to the Federal Rules of Evidence, and was based upon concerns now dealt with adequately in Fed. R. Evid. 403.

This case was the first case facing the Sixth Circuit Court of Appeals where the difference in standards affected the outcome of

the appeal — under the clear and convincing standard, Huddleston's conviction was reversed; under the preponderance standard, it was affirmed. See *United States* v *Dabish*, 708 F.2d 240, at 243 n 2 (6th Cir. 1983); and *United States* v *Vincent*, 681 F.2d 462, 465 (6th Cir. 1982) where the courts recognized that the majority of circuits have adopted the clear and convincing standard, but that the facts in neither case required choosing between the standards. *Ebens* is similar to *Dabish* and *Vincent*, in that deciding between the standard was not necessary to the court's decision. The *Ebens* court did not engage in any analysis as to which was the more appropriate standard to adopt. The court merely noted that under *United States* v *Leonard* 524 F.2d 1076, 1090-91 (2nd Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), courts may admit prior bad acts evidence if the prerequisite preponderance of evidence standard is met. *Ebens*, at 1432. The court immediately went on to note the dichotomy in standards, and concluded that *"it was an abuse of discretion under either test to have admitted the testimony."* (that Ebens supposedly made racial epithets toward blacks eight years before killing Vincent Chin) *Ibid.* at 1433. [Emphasis added].

Here, the difference in standards did make a difference in outcome. Moreover, in criminal trials and appeals, federal courts are probably faced with questions relating to the proper admission of similar acts evidence under Fed. R. Evid. 404(b) more often than any other evidentiary question.[1] As such, and in view of the conflict in circuits, this issue is ripe for review by this Court.

The Seventh, Eighth, Ninth, and D.C. Circuit Courts of Appeals have adopted the clear and convincing standard. *United States* v *Tuchow*, 768 F.2d 855, 862 (7th Cir. 1985); *United States* v *Nabors*, 761 F.2d 465, 471 (8th Cir. 1985); *United States* v *Herrera-Medina*, 609 F.2d 376, 379 (9th Cir. 1979); and *United States* v *Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir. 1985).

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[1] Now that the impeachment of defendants by prior convictions under Rule 609 has been definitively clarified by the requirement that defendants must take the stand and be impeached in order to preserve the issue for appellate review *Luce* v *United States*, 469 US 38 (1986).

The Second, Fourth, Fifth, and Eleventh Circuits follow the preponderance standard. *United States* v *Leonard*, *supra*; *United States* v *Martin*, 773 F.2d 579, 583 (4th Cir. 1985); *United States* v *Beechum*, 582 F.2d 898 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920 (1979); and *United States* v *Dothard* 666 F.2d 498, 501 (11th Cir. 1982). The Tenth Circuit falls somewhere between the two standards. In *United States* v *Shepard*, 739 F.2d 510 (10th Cir. 1984), the court found that where the government's case depended entirely on the testimony of an accomplice turned state's evidence, that accomplice should not have been permitted to give uncorroborated testimony concerning the prior use of explosives by the defendant. The court reasoned that evidence of prior criminal acts is almost always prejudicial to the defendant, and concluded that the jury might have been led by the prior crime evidence to overlook the fact that the accomplice's testimony was the only evidence linking the defendant to the crime charged.

Beechum is the only *en banc* decision on the issue. It is also the only decision in which a Circuit Court of Appeals has rejected a standard previously adopted by that circuit. The Sixth Circuit herein in the amended opinion makes much of the fact that the circuits which follow the clear and convincing standard adopted that position prior to the existence of the Federal Rules of Evidence. The court states: "The contrary view seems to have been based on concerns now dealt with adequately in Rule 403 of the Federal Rules of Evidence." (p. 5 of slip opinion.) The court implies that the clear and convincing standard is antiquated, and not needed in the face of the "protections" of Rule 403.

Petitioner respectfully disagrees with the court's analysis. As the five dissenters recognize in *Beechum*, *supra* at 922, the Seventh, Eighth, and Ninth Circuits have calmly preserved the clear and convincing proof standard in the face of Rule 404(b), citing for authority pre-Rule 404(b) cases, post-Rule 404(b) cases, and the rule itself. *United States* v *Bledsoe*, 531 F.2d 888, 891 (8th Cir. 1976). The Ninth Circuit has termed Rule 404(b) a codification of prior case law. *United States* v *Rocha*, 553 F.2d 615, 616 (9th Cir. 1977). See also *United States* v *Herrera-*

Medina, supra at 379, where the court interprets 404(b) as not favoring the admission of similar acts evidence. The Ninth Circuit places the burden on the government to show that the evidence offered is relevant, and that it is more probative than prejudicial, despite the opposite language concerning the admission of relevant evidence under Rule 403, *United States* v *Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979)

Which test to adopt is not an easy question. The Fifth Circuit split 10-5 in their *en banc* decision in *Beechum*, and spent 29 pages in the Federal Reporter discussing the merits of each standard. It is impossible for Petitioner to digest the conflicting concerns and legislative and jurisprudential history within the thirty page limitation of this petition. (Nor does this writer pretend to be able to do so as eruditely as the authors of the opinions in *Beechum*.) Petitioner urges this Court to carefully read the competing opinions in *Beechum*. Petitioner contends that the dissent, and the Seventh, Eighth, Ninth, and D.C. Circuits have adopted the better reasoned view.

The preponderance test is too broad a reading of Rule 404(b) and allows the second sentence of the rule to swallow up the first. Under such test, so long as the probative value of bad acts evidence is not "substantially outweighed" by its prejudicial effect (Rule 403), the evidence will be admitted. The trouble is, such a rule completely ignores the fact that such evidence is just bad character evidence now wrapped in similar acts sheep's clothing. Bad character evidence is not favored. This is apparent from the strictures to admitting such evidence under the exceptions of Rules 608 and 609. Under those rules, prior offenses may not be admitted into evidence unless the probative value outweighs the prejudicial effect. Under the preponderance test coupled with the supposed "protections" of Rule 403, the government can submit with ease prejudicial, flimsy evidence of an extrinsic offense, because it is admitted under Rule 403 unless the prejudicial effect *substantially* outweighs the probative value. However, under Rule 609, where the bad act has been proved beyond a reasonable doubt, the admissions standards are much stricter. The difference makes no sense.

In the event this Court grants this petition, and adopts the preponderance standard, Petition contends that the trial court abused its discretion in admitting evidence of the black and white televisions because of the reasons stated *infra*, pp. 6-7. As the Court of Appeals herein recognized, the only evidence in support of the government's assertion that the televisions were stolen was Huddleston's lack of a bill of sale, and the relatively low sale price of the televisions. In the face of attorney Lewis's testimony, his selling 500 of the sets at his store at the same price as Huddleston, and the fact that the government has no evidence as to the origins of the televisions, they did not prove by a preponderance of the evidence that the televisions were stolen. Therefore, the trial court abused his discretion under either standard in allowing the jury to hear about the prior sale of the televisions.

II. REGARDLESS OF WHICH HARMLESS ERROR TEST IS APPLIED, THE ADMISSION OF THE PRIOR SALE OF THE TELEVISIONS WAS NOT HARMLESS.

In the initial opinion here, the Sixth Circuit found that the admission of the prior bad acts evidence was not harmless error. The court applied the harmless beyond a reasonable doubt test enunciated in *Chapman* v *State of California, supra*. However, it is important to note that almost in the same breath, the court rejected the government's contention that petitioner's lack of contemporaneous objection at trial to the similar acts evidence prevented reversal, because admission of the evidence was not plain error under Fed. R. Crim. P. 52(b). The panel applied the plain error doctrine, and found that:

> "the admission of the prior acts *affected the 'substantial rights' of appellant:* especially since his defense at trial was that he did not know the tapes were stolen. Since it was plain error to admit evidence of the sale of the televisions without clear and convincing proof that they had been stolen, we find there was a miscarriage of justice. Thus, the issue was

preserved for appeal."[2] 802 F.2d 877-878. [Emphasis added].

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[2]It was actually unnecessary for the panel to engage in a Rule 52(b) analysis because the majority rule is that the granting or denial of a motion *in limine* is sufficient to preserve for purposes of appeal the specific issue raised in the motion, even without a contemporaneous objection to admission of the evidence during trial. The contemporaneous objection requirement in Fed. R. Evid. 103(a) must be read in conjunction with Fed. R. Civ. P. 46 which states that formal exceptions are unnecessary. Both rules have as their objective that potential trial problems be brought to the attention of the trial judge in a manner that the court can timely rule on the issue. Thus, the test is whether the objection during trial would have been more in the nature of a formal exception, or in the nature of a timely objection calling attention to the court to a matter it needs to consider at the time of the objection.

Here, the trial court made a definitive ruling at the time of granting the motion *in limine* that prior and subsequent bad acts evidence would be admitted. The court gave absolutely no indication that it would reconsider the matter during trial. A contemporaneous objection would have only been an unnecessary trial interruption, which would have in turn emphasized the prejudicial nature of the testimony to the jury. In such cases, the Third, Eighth, Ninth, and Eleventh Circuits have all held that an objection to the admission of evidence made during a motion *in limine* is preserved on appeal despite the failure to object to the evidence at trial. *American Home Assur. Co.* v *Sunshine Supermarket, Inc.*, 753 F.2d 321, 324-25 (3rd Cir. 1985); *Sprynczynatyk* v *General Motors Corp.*, 771 F.2d 1112, 1118-19 (8th Cir. 1985); *Sheehy* v *Southern Pacific Trans. Co.*, 631 F.2d 649 (9th Cir. 1980); and *United States* v *Kerr*, 778 F.2d 690, 698-99 (11th Cir. 1985). The last case involved a Rule 404(b) question in a criminal prosecution.

Only the Fifth Circuit requires an objection during trial in addition to the objection made during the *in limine* motion. *Rojas* v *Richardson*, 703 F.2d 186, *opinion set aside for other reasons on rehearing*, 713 F.2d 116 (5th Cir. 1980) This minority view is predicated on the theory that a motion *in limine* presents a largely hypothetical question and that a trial court is in a better position to rule on an evidentiary issue in light of a specific trial situation.

However, such a view is not applicable to a situation like this case where the court made a definitive ruling during the motion, and gave no indication that he wanted to hear trial testimony, or that he would reconsider the matter during trial.

The Sixth Circuit has not been directly faced with this question. However, in *United States* v *Faudman*, 640 F.2d 20, 24 (6th Cir. 1981), the court held that a defendant's written request for an instruction different than that given by the trial court preserved the issue for appellate review despite his later failure to object on the record. The court reasoned that the defendant had adequately apprised the trial judge of his position, and that a later verbal objection was not necessary.

Petitioner likewise adequately apprised the trial judge of his objection to the prior bad acts evidence during the motion *in limine*. The issue was preserved for appeal, and a "plain error" analysis under Fed. R. Crim. P. 52(b) was unnecessary.

In view of this finding that the error affected the substantial rights of Mr. Huddleston, and resulted in a miscarriage of justice, it is difficult to understand the court's ruling on rehearing that the error was harmless under the test enunciated in *Kotteakos* v *United States*, 328 U.S. 750, 765 (1946). Petitioner will admit that the *Kotteakos* test has often been applied to errors not involving constitutional claims. However, contrary to the contention of the government and of Judge Nelson in his dissent to the initial opinion herein, the *Chapman* test has not been reserved only for claims of constitutional error. The Sixth Circuit Court of Appeals has applied the harmless beyond a reasonable doubt test to a claim of non-constitutional error under Rule 404(b) in *United States* v *McFadyen-Snyder*, 552 F.2d 1178, 183-184 (6th Cir. 1977). See also *United States* v *Rowan* 518 F. 2d 685, 691-92 (6th Cir. 1975). For cases applying the *Chapman* standard to non-constitutional errors in other circuits, see Saltzburg, *Federal Rules of Evidence Manual*, Fourth Edition, Rule 103(a), Harmless error; Criminal cases, pp. 21-23. Petitioner will admit, however, that the general trend in federal courts is to restrict the application of the *Chapman* test to errors involving constitutional claims. See *United States* v *Terry*, 729 F.2d 1063, 1069-79 (6th Cir. 1984); and *United States* v *Cunningham*, 804 F.2d 58, 61-62 (6th Cir. 1986) (both involving 404(b) claims of error).

An error under the *Kotteakos* test is deemed harmless unless it prejudices the defendant by having a "substantial and injurious effect or influence in determining the jury's verdict." *United States* v *Lane*, 54 U.S.L.W. at 4126, *citing Kotteakos, supra*. The Sixth Circuit here in its amended opinion ruled that any error in admitting evidence of the prior sale of the televisions was harmless under *Kotteakos*. However, the court in its earlier opinion had already ruled that the error affected Mr. Huddleston's substantial rights, and resulted in a miscarriage of justice.

The decisions are not reconcilable — the plain error test under Fed. R. Crim. P. 52(b) is almost identical to the *Kotteakos* test. Two judges of the court initially ruled that Mr. Huddleston's substantial rights had been violated and that he had suffered a

miscarriage of justice. Four months later, the same two judges ruled that the same admission of evidence had not had a substantial effect on the verdict, and that Mr. Huddleston had not suffered a miscarriage of justice.

It is important to remember that this was a close case. The government has continually argued on appeal that evidence of guilt was overwhelming. The jury must not have thought so. They deliberated over two days, and acquitted Mr. Huddleston on the April 19 sale, but convicted him of the April 25 possession. The verdicts are seemingly irreconciable. Nothing happened during that six day period which would lead the jury to believe that Mr. Huddleston had any more knowledge about the legitimacy of those tapes on April 25 than he had on April 19.

The government makes much of the fact that the later acts evidence was much more damaging. However, Petitioner denied that he knew the later merchandise was stolen — the only evidence to the contrary was the testimony of the FBI agent, and even he admitted on cross-examination that Mr. Huddleston insisted numerous times during their meeting that the merchandise was not hot. Moreover, even assuming that such evidence was more damaging than evidence of the televisions, it still does not explain how the jury came to the conclusion that Mr. Huddleston knew the tapes were stolen on April 25, but did not know they were stolen on April 19. His meeting with the FBI agent did not occur until May 1, 1985.

Accordingly, Petitioner Guy Rufus Huddleston respectfully requests this Court to grant his Petitioner for Writ of Certiorari, in order to resolve the appropriate standard of proof for admission of 404(b) evidence and the appropriate standard for reviewing harmless error claims for such evidence.

Dated: June 20, 1987

Respectfully submitted,

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APPENDIX A

APPENDIX A

NO. 85-1938
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

GUY RUFUS HUDDLESTON,
Defendant-Appellant

ORDER
FILED JUNE 1, 1987

ORDER STAYING MANDATE

Upon consideration, it is ORDERED that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, *CLERK*

(s) John P. Hehman

APPENDIX B

APPENDIX B

No. 85-1938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GUY RUFUS HUDDLESTON,
Defendant-Appellant

ORDER
FILED APRIL 30, 1987

BEFORE: KEITH and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, *Clerk*

APPENDIX C

APPENDIX C

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1938

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GUY RUFUS HUDDLESTON, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed February 20, 1987

Before: KEITH and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

PER CURIAM. On Petition for Rehearing. The appellant, Guy Rufus Huddleston, was convicted on one count of a two count indictment charging him with having violated 18 U.S.C. §§ 659 and 2315 by possessing and selling certain stolen videotapes. We reversed the conviction, in a decision reported at 802 F.2d 875, holding that evidence of prior misconduct of a similar nature should not have been admitted in the absence of clear and convincing proof that the goods involved in the prior transaction were stolen. The government has petitioned for rehearing. That petition is granted, and in light of the recent decision of another panel of this court in *United States v. Ebens*, 800 F.2d 1422 (6th Cir.

1986), we now conclude that the clear and convincing evidence standard does not govern the admissibility of "similar acts" evidence sought to be admitted under Fed. R. Evid. 404(b). Applying the preponderance of the evidence standard adopted in *Ebens*, we cannot say that the district court abused its discretion in admitting evidence of the similar acts in question here. Resolving the other issues raised by Appellant Huddleston in favor of the government, we shall affirm the judgment of the district court.

I. *Evidence of Prior and Subsequent Transactions*

As stated in our earlier opinion, Mr. Huddleston challenges the admission of evidence that he had been involved in the sale of certain television sets at $28 each and the attempted sale to an FBI agent of certain stolen appliances. Federal Rule of Evidence 404(b) provides as follows:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

When a court considers admitting such evidence, a two-step analysis must be undertaken. First, the court must decide whether the evidence would serve a permissible purpose such as one of those listed in the second sentence of Rule 404(b). *United States v. Dabish*, 708 F.2d 240, 242 (6th Cir. 1983). If so, the court must consider whether the probative value of the evidence is outweighed by its potential prejudicial effect. *Id.*

The evidence challenged by Mr. Huddleston, including the evidence of his prior dealings in $28 television sets, was admitted, as the trial court instructed the jury, only for whatever bearing it might have on "Defendant's intent, plan,

knowledge, or absence of mistake or accident in this case." The government contended that Mr. Huddleston had been engaged in a pattern of illegal activity, and that this tended to prove he knew the videotapes were stolen.

The evidence of Mr. Huddleston's other activities could reasonably be thought to have a high probative value. The televisions and the Memorex tapes both came from the same supplier, a truckdriver, and when the goods were presented to him, Mr. Huddleston did not ascertain what their source was, nor did he ask to see the truckdriver's bill of sale. Both the television sets and the tapes were sold at prices well below their value, and, in the case of the tapes, below the cost of manufacture. Other goods handled by Mr. Huddleston were shown to have been stolen, and a tape recording confirmed the testimony of the FBI agent that Mr. Huddleston referred to some of them as "hot." Taken as a whole, the evidence strongly indicated, as the government argued, that appellant was engaged in a pattern of illegal activity.

The evidence relating to the television sets was no more prejudicial than that relating to other merchandise supplied by the truckdriver, and the trial judge's charge to the jury minimized any risk of prejudice:

> "You have heard evidence of the defendant's possession of goods other than the tapes involved in this case.
>
> The defendant is not on trial for activities pertaining to any goods other than the tapes.
>
> This evidence is admitted only as it may bear on defendant's intent, plan, knowledge, or absence of mistake or accident in this case.
>
> It is not to be used by you to prove the character of the person to show that he acted in conformity with that character."

There is conflict among the circuits as to whether the government must prove by "clear and convincing" evidence that

the defendant engaged in the prior bad act. In *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), the Court of Appeals for the Second Circuit held, in an opinion written by Judge Friendly, that if "the aggregate of the evidence" is sufficient to permit a finding, beyond reasonable doubt, of criminal intent as to the crime charged, a "preponderance [of the evidence] standard is sufficient" for the subsidiary facts offered to establish such intent. Judge Friendly said that the contrary view set forth in cases such as *United States v. Broadway*, 477 F.2d 991, 995 (5th Cir. 1973), "appears to rest on a misconception." 524 F.2d at 1090. This court has now endorsed Judge Friendly's view, citing *Leonard* in support of the proposition that "[c]ourts may admit evidence of prior bad acts if the proof shows *by a preponderance of the evidence* that the plaintiff did in fact commit the act." *United States v. Ebens*, 800 F.2d 1422, 1432 (6th Cir. 1986) (emphasis supplied)

In a carefully reasoned opinion handed down by the Court of Appeals for the Fifth Circuit, sitting *en banc* soon after the Federal Rules of Evidence became effective, that court also adopted Judge Friendly's view and overruled *United States v. Broadway*, 477 F.2d 991, *supra*. *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). Noting that the Federal Rules of Evidence "place greater emphasis on admissibility of extrinsic offense evidence" than the Supreme Court had done earlier, the *Beechum* court held that:

> "The [trial] judge need not be convinced beyond a reasonable doubt that the defendant committed the extrinsic offense, nor need he require the Government to come forward with clear and convincing proof. [Footnote omitted.] The standard for the admissibility of extrinsic offense evidence is that of Rule 104(b): 'The preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist.' 21 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5054, at 269 (1977)." 582 F.2d 898, 910 n.13 & 913 (5th Cir. 1978).

The logic of the *en banc* decision in *Beechum* corresponds to that applied by Judge Learned Hand in *United States v. Brand*, 79 F.2d 605 (2d Cir. 1935), *cert. denied*, 296 U.S. 655 (1936). In *Brand*, which affirmed a conviction for transporting a stolen automobile, the court rejected the doctrine "that evidence of the receipt of other stolen goods is not admissible unless the prosecution proves that the accused knew them to have been stolen." *Id.* at 606. We are disposed to follow these well-reasoned decisions in preference to the contrary view adopted, initially, in some other circuits before the Federal Rules of Evidence came into existence. The contrary view seems to have been based on concerns now dealt with adequately in Rule 403 of the Federal Rules of Evidence.

Even if the trial court did err in this case by letting the jury know about the television sets, the error was harmless. One can say here, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). The "harmless beyond a reasonable doubt" standard announced in *Chapman v. State of California*, 386 U.S. 18 (1967), dealt only with error of constitutional dimension, and any erroneous evidentiary ruling in this case was clearly not of constitutional magnitude.

II. *Jury Instruction on Character Evidence*

Mr. Huddleston next contends that the district court committed reversible error by failing to instruct the jury that character evidence, when considered with other evidence, may create a reasonable doubt as to a defendant's guilt. Although the court was required so to instruct the jury, *Edington v. United States*, 164 U.S. 361, 164-65 (1896), we believe that the district court adequately met this responsibility in charg-

ing that the jury should consider the character evidence along with all other evidence in determining whether the prosecution had sustained its burden of proving guilt beyond a reasonable doubt.

III. *Impeachment of Witness With 13-Year-Old Misdemeanor Conviction*

Mr. Huddleston contends that the distri[illegible]rt erred in admitting evidence of the prior misdemeanor conviction of witness Alphonse Lewis, Mr. Huddleston's business associate. Mr. Lewis testified about his investigation of the *bona fides* of the truckdriver who supplied the television sets and the videotapes, and he testified that he satisfied himself that the televisions were not stolen and that he so informed the appellant. Mr. Lewis also testified that the truckdriver presented him "a so-called bill of lading" for the television sets, but that he could not find it at the time of trial.

At the end of the cross-examination of Mr. Lewis, the court allowed the government to ask whether Mr. Lewis had ever been convicted of a crime. Mr. Lewis admitted that he had been convicted of a misdemeanor for not filing an income tax return thirteen years earlier. After the jury retired for the day, the trial judge admonished the prosecuting attorney for impeaching the witness with a misdemeanor conviction of such ancient vintage. The judge said that if he had known the conviction was a mere misdemeanor, he would not have allowed the question.

Federal Rule of Evidence 609 provides in part as follows:

> "(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that he had been convicted of a crime shall be admitted . . . but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence

> outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

No written notice was given here, but Mr.Huddleston does not deny that the government was unaware that Mr. Lewis was to be called as a witness until a few minutes ahead of time. Advance written notice of the government's intent to impeach Mr. Lewis was therefore not feasible. Mr. Huddleston was aware of the conviction, moreover, and did not object to the lack of written notice. The failure to give written notice was not fatal to the government.

In deciding to admit, under Rule 609(a)(1), what it thought would be evidence of a felony conviction, the court necessarily determined that the probative value of the evidence outweighed its prejudicial effect. The court apparently would have struck that balance differently had it known the conviction was for a misdemeanor, and that would have made the evidence inadmissible under Rule 609(a)(1). We would have thought, however, that when an attorney (which Mr. Lewis was) has been convicted of failing to file a federal income tax return, the crime could reasonably be said to have

"involved dishonesty" and thus be admissible without more under Rule 609(a)(2).

In any event, we think that if it was error to admit evidence of Mr. Lewis' conviction, the error was harmless. In most of the cases dealing with evidence of prior criminal convictions, it was the defendant himself who was so impeached. Any prejudice to the defendant is normally greater where the defendant's own character is being attacked, and the prejudice to Mr. Huddleston here seems slight.

Finally, Mr. Huddleston did not let the court know ahead of time that the conviction was for a misdemeanor, did not clearly object to admission of the evidence, and did not ask that the jury be instructed to disregard the evidence. Mr. Huddleston argues on appeal that the district court should have struck the testimony *sua sponte* or instructed the jury —again on the court's own initiative—to consider the testimony only as it related to Mr. Lewis' credibility. We do not find these arguments persuasive.

IV. *Venue*

Finally, Mr. Huddleston contends that venue was improper in the Eastern District of Michigan as to the first count, which charged him with selling stolen property. Although he was acquitted on that count, Mr. Huddleston contends that the fact that the jury found he knowingly possessed stolen tapes several days later indicates a compromise verdict and suggests he might have been acquitted had he been charged with only one count.

We do not reach the venue question because we find no reason to suppose that the first count affected the jury's deliberations with respect to the second count. The jury could have determined that Mr. Huddleston learned that the tapes were stolen only after he had sold some of them. His subsequent statement to the FBI Agent that some of the goods he was

attempting to sell were "hot" provides a measure of support for that belief.

Our decision of October 8, 1986, is VACATED, and the judgment of the district court is AFFIRMED.

APPENDIX D

APPENDIX D

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GUY RUFUS HUDDLESTON, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 8, 1986

Before: KEITH and NELSON, Circuit Judges; and CONTIE, Senior Circuit Judge.

KEITH, Circuit Judge, delivered the opinion of the court, in which CONTIE, Senior Circuit Judge, joined. NELSON, Circuit Judge, (pp. 9-16) delivered a separate dissenting opinion.

KEITH, Circuit Judge. Appellant, Guy Rufus Huddleston, was convicted after a jury trial on one count of a two count indictment.[1] He was convicted pursuant to 18 U.S.C. § 659 arising out of his possession of 500 stolen video tapes.[2]

---

[1] Appellant was acquitted of selling 4,000 stolen blank VHS tapes which is an offense under 18 U.S.C. § 2315.

[2] The tapes were in appellant's possession between April 23 and April 25, 1985.

Because the district court abused its discretion in admitting evidence under Fed. R. Evid. 403, we reverse.

I.

In early April 1985, Memorex brand T-120 VHS blank cassette tapes were manufactured at the Tandy-Bell & Howell plant in Northrook, Illinois. After these tapes were made, they were sent to Memtech Products in Arlington Heights, Illinois.[3] Memtech sold the tapes to the Michigan K-Mart Corporation, for $4.69 per tape. Memtech shipped 32,448 blank VHS tapes to K-Mart via an Overnight Express semi-trailer truck. The trailer was first sent to the Overnight Express yard in South Holland, Illinois, because K-Mart was not scheduled to take delivery until April 16, 1985. On April 15, Overnight Express employees discovered the trailer was missing.

On April 17, 1985, appellant informed Karen Curry, the manager of the Magic Rent-to-Own in Ypsilanti, Michigan that he had a truckload of blank VHS tapes which he sought her assistance in selling.[4] Ms. Curry asked appellant if the tapes were stolen, and he assured her they were not. Appellant told Ms. Curry that he purchased the tapes directly from the manufacturer in Chicago for one dollar per tape. He also told her that he had a bill of sale, and that he wanted her to sell them in no less than 500 tape lots at $2.75 to $3.00 per tape. Before she arranged the sale of any tapes for appellant, Ms. Curry checked with the Ypsilanti Police Department to determine if the tapes were stolen. Thereafter, Ms. Curry called area retailers. She informed them that the tapes would be

[3] Memtech which is the sales branch of Tandy, purchased the tapes for $4.53 each.

[4] Ms. Curry testified that appellant was a friend of Alphonse Lewis, the owner of the Magic Rent-to-Own discount appliance and rental store. Apparently, appellant was a local housing contractor who came by Magic Rent-to-Own once a week to use the store as his office. Ms. Curry took messages and occasionally helped appellant with typing.

sold in lots of no less than 500, and that no personal or business checks would be accepted. Consequently, Ms. Curry arranged sales of 4,000 tapes to Curtis Mathis Home Entertainment Center, 500 tapes to New York Video World and 500 tapes to Movieland. Ms. Curry also arranged a sale to Nowshowing Video. Appellant sold Nowshowing Video 500 tapes for $1,500: he also signed a receipt.

Ms. Curry testified that appellant used his own name in every transaction, and instructed her that he would take care of problems with defective tapes; therefore, she told customers that defective tapes could be returned to Magic Rent-to-Own. Appellant paid Ms. Curry twenty-five cents a tape for arranging the first two sales. Thereafter, the FBI contacted Ms. Curry and told her the tapes were stolen. Ms. Curry was instructed not to tell appellant that she knew the tapes were stolen. Conversely, appellant never indicated in any way to Ms. Curry that he knew the tapes were stolen.

At the outset of the trial, the government made a motion *in limine* to introduce evidence of similar acts, pursuant to Fed. R. Crim. P. 404(b). The government stated that it intended to present evidence showing that appellant was involved in the sales of television sets prior to the sale of the VHS tapes, that he talked about selling VHS tapes, and that he attempted to sell refrigerators to an FBI under cover agent five days after the sale. Evidence was admitted that approximately one month before the dates charged in the indictment, appellant sold about forty black and white television sets to Paul Toney, a record store owner, at a cost of $28.00 each. No evidence was presented at trial showing that the televisions were stolen.[5] During these transactions appellant told Mr. Toney that he had purchased a truckload of blank video cassette tapes which he would also sell to Toney for $2.75

[5] The government's only support for the assertion that the televisions were stolen was the appellant's failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price.

a tape. On May 1, 1985 appellant offered to sell 10,000 VHS movie tapes to undercover FBI Agent Robert Nelson at a cost of $1.57 each. Appellant told Agent Nelson that he purchased the tapes in Chicago. Appellant also offered to sell Zenith color television sets at $200.00 each. Agent Nelson asked appellant whether these items were stolen. Agent Nelson testified that appellant stated that either "some are hot and some are not" or, most of the tapes "were not hot." Appellant testified that he told Agent Nelson all of the items "were not hot."

Agent Nelson also testified that appellant offered to sell Amana refrigerators, ranges and icemakers. The Amana appliances were part of an interstate shipment which was recently reported stolen. Upon delivery of the refrigerators to Agent Nelson, appellant and a Mr. Leroy Wesby were arrested.

II.

On appeal, appellant raises several assignments of error.[6] However, we will not address each assignment. Rather, our focus will center on whether the trial court abused its discretion in permitting the government to present evidence of appellant's *prior* misconduct. Specifically, whether it was an abuse of the trial court's discretion to admit evidence pertaining to appellant's sale of black and white televisions.[7]

---

[6] Appellant argues: **(1)** the trial court committed reversible error by refusing to instruct the jury that character evidence may create a reasonable doubt of guilt; **(2)** the impeachment of Alphonse Lewis with a 13 year old misdemeanor conviction was improper, affected appellant's substantial rights and denied him a fair trial; **(3)** the trial court abused its discretion in allowing the government to present evidence of appellant's prior and subsequent misconduct; and **(4)** appellant's motion to dismiss Count 1 for lack of venue should have been granted.

[7] The district court found that this evidence was relevant to the question of whether appellant knew that the VHS tapes were stolen, and that the probative value of such evidence outweighed its prejudicial effect to the appellant.

Generally, under Fed. R. Evid. 404(b) evidence of a criminal defendant's prior misconduct is inadmissible during the prosecution's case in chief for the purpose of showing the accused's bad character or criminal propensity. *United States v. Ailstock*, 546 F.2d 1285, 1289 (6th Cir. 1976). However, evidence of a defendant's prior misconduct may be admitted to show motive, intent, absence of mistake, opportunity, preparation or knowledge. *United States v. Schaffner*, 771 F.2d 149 (6th Cir. 1985); Fed. R. Evid. 404(b). Our review of the admission of evidence challenged under Fed. R. Evid. 404(b) requires this Court to next make two determinations: whether the evidence admitted is relevant and whether the probative value of the evidence outweighs its potential for prejudice. *United States v. Dabish*, 708 F.2d 240, 242 (6th Cir. 1983); Fed. R. Evid. 403. It is clear the contested evidence was relevant. What is at issue is whether its probative effect was outweighed by its prejudicial value. The trial court's balancing of probativeness and prejudice is reviewed under an abuse of discretion standard. *Id.*

In reviewing the evidence of the sale of the black and white televisions, we note the government never proved that they were stolen. Although the government implied that the televisions were stolen and that appellant and Mr. Lewis were lying about the legitimacy of the sale, no evidence was presented by the government concerning the origin of the televisions. The appellant's defense at trial was that he did not know the tapes he possessed were stolen; thus the government should not have been allowed to present "misconduct" evidence when it could not show that there was any misconduct with regard to the televisions. Consequently, since the prejudicial value of the admission of the sale of the televisions outweighed the probative value, we hold that the trial court abused its discretion.

Requirements for the admission of other crimes, wrongs or acts evidence under Rule 404(b) are well established in other circuits. One of the prerequisites for admission of other

crimes evidence is clear and convincing proof of the similar offense. *United States v. Two Eagle*, 633 F.2d 93, 96 (8th Cir. 1980); *United States v. Robbins*, 613 F.2d 688 (8th Cir. 1979); *United States v. Bailleaux*, 685 F.2d 1105 (9th Cir. 1982); *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978). Adopting the clear and convincing proof standard in this circuit, we hold that the government failed to meet that standard. Specifically, the government's attorney admitted at oral argument before this Court that no clear and convincing proof was presented to the trial court that the televisions were stolen or that appellant knew that they were stolen. Consequently, it was impermissible for the jury to receive evidence that they could infer the televisions were stolen absent clear and convincing proof.

The government contends that the admission of the similar acts evidence was harmless error. We disagree. The introduction of such evidence in the government's case in chief was not harmless beyond a reasonable doubt. *See Chapman v. State of California*, 386 U.S. 18 (1967).

In *United States v. Manafzadeh*, 592 F.2d 81 (2d Cir. 1979) the court ruled that other crimes evidence was admitted improperly since it afforded the jury the opportunity to draw the impermissible inference that because the defendant had apparently acted unlawfully on another occasion, he must have committed the unlawful acts charged in the case.[8] Here, the impermissible inference went a step further. The government made a motion, prior to trial, to introduce prior similar acts evidence which the district court admitted because it was relevant. The similar act evidence, (television transaction) was a major point of contention throughout the trial since

[8] *Contra United States v. Chaimson*, 760 F.2d 798 (7th Cir. 1985) (holding that in cases where government must prove specific intent as an element of crime charged, evidence of other acts may be introduced to establish that intent).

appellant maintained he did not know the televisions were stolen. Furthermore, the admission of the prior acts evidence was accentuated because appellant's defense at trial was that he did not know the tapes he possessed were stolen.[9] Since admission of the prior act evidence was potentially very prejudicial, we cannot hold that it was not harmless beyond a reasonable doubt.

The government also argues that during the trial appellant never objected to the prior acts evidence nor did he move to strike it; therefore, the government contends Fed. R. Crim. P. 52(b) provides that plain errors or defects affecting substantial rights may be considered although they were not brought to the trial court's attention. The plain error doctrine permits reversal despite lack of objection if there has been miscarriage of justice. *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985); *Higgins v. Hicks Co.*, 756 F.2d 681 (8th Cir. 1985). Here, it has already been established that the admission of the prior acts evidence was not harmless beyond a reasonable doubt. Furthermore, it is clear that the admission of prior acts evidence affected the "substantial rights" of appellant: especially since his defense at trial was that he did not know the tapes were stolen. Since it was plain error to admit evidence of the sale of the televisions without clear and convincing proof that they had been stolen, we find there was a miscarriage of justice. Thus, this issue was preserved for appeal.

In light of the fact that the admission of the prior acts evidence was not harmless beyond a reasonable doubt, that the evidence that the television sets were stolen was not clear and convincing and that this evidence was more prejudicial than probative, we find that the admission was an abuse of

[9] The government attempted to have the jury infer the television sets were stolen and from that inference in turn infer that since the appellant had sold "stolen" television sets earlier, he must have possessed and sold the stolen tapes here.

discretion.

Accordingly, the district court's verdict is reversed and remanded.

DAVID A. NELSON, Circuit Judge dissenting. I agree with the court that the evidence of appellant's contemporaneous dealings in $28.00 television sets of dubious pedigree was clearly relevant. Appellant having obtained these suspiciously inexpensive new television sets from the same truckdriver who supplied him—at about the same time and in about the same manner—with Memorex videotapes from a stolen semitrailer, it seems to me equally clear that the introduction of the evidence was not unfairly prejudicial. "No strictly mechanical test provided by the appellate courts will help the trial judge much in sensitively drawing a fair balance," 2 Weinstein & Berger, *Weinstein's Evidence*, ¶ 404[10], at 404-73 (1985), but looking at the entire record in retrospect, I do not think the trial court's determination was an abuse of discretion. If the trial court did abuse its discretion in admitting evidence of the entire course of dealings between appellant and his supplier, moreover, I believe that the error was harmless. Accordingly, I am constrained to dissent.

The supplier in question was introduced to appellant in December of 1984 as a truckdriver named Leroy Wesby. Mr. Wesby told appellant that he had 770 television sets for sale, and he asked if appellant knew anyone who might be interested in buying them. Appellant introduced the truckdriver to the owner of the "Magic Rent-To-Own" equipment rental business, Mr. Alphonse Lewis, who bought 500 of the sets and paid appellant a finder's fee. Appellant testified that he and Mr. Lewis interviewed the truckdriver "for approximately five hours" to satisfy themselves that the goods had not been stolen; in all that time, however, they never asked him where he had acquired the property. Unlike Mr. Lewis, moreover, appellant never claimed that the truckdriver ever showed him a receipt or bill of sale for the television sets—or for the stolen Memorex tapes, or for any of the other merchandise he offered appellant from time to time. (Mr. Lewis testified that the truckdriver "did present to me a so-called bill of lading" for the television sets, but this so-called bill

of lading was not introduced in evidence; Mr. Lewis claimed he was unable to find it at the time of trial.)

When the truckdriver sought appellant's assistance in selling the stolen Memorex videotapes, appellant's response, as described on cross-examination, fit the pattern that had been followed in the case of the television sets. Appellant asked if the tapes had been stolen, but (contrary to his testimony on direct examination) he did not inquire where they had come from, and he did not claim to have asked to see a receipt or bill of sale:

> "Q. When Mr. Wesby called you and told you he had some tapes, did you ask him where he got them?
>
> A. Not that I can remember.
>
> Q. At that point, you weren't concerned about the tapes being stolen?
>
> A. At that—I did ask him if the material was stolen and we always talked about if the material is stolen.
>
> Q. But you never asked where he got them from?
>
> A. No.
>
> Q. Did you ever ask to see a receipt or a bill of sale?
>
> A. I always ask if the stuff was safe and if I could proceed in a businesslike manner in selling the materials."

After Mr. Lewis had taken possession of the 500 television sets, appellant arranged for the resale of 38 of them, at $28.00 each (a sum out of which Mr. Lewis presumably made a profit and appellant received a fee). The customer expressed an interest in buying more at that price. In order to be able to buy more television sets, as the customer testified, appellant

told him that he would also have to take blank videocassette tapes, of which "they had just purchased a truckload. . . ." The evidence thus showed not only that appellant had a common source for the television sets and the tapes, and that appellant was more interested in knowing that both products were "safe" than in knowing where they came from, but the evidence also showed that appellant tried to tie the tapes to the television sets in disposing of them. If the jury had been kept in the dark about the television sets, therefore, it could not have been given the full story on appellant's sales efforts with respect to the tapes.

The story of how appellant sold the tapes is not uninstructive. Appellant was a construction contractor by trade, not a merchant. He had no established retail or wholesale business. When the Memorex tapes turned up, he went to the Magic Rent-To-Own store owned by his friend Mr. Lewis and prevailed upon the manager of the store, Karen Curry, to offer the tapes for sale in the store's name. The manager was highly suspicious:

> ". . . 'Guy,' I said, 'Are they stolen?' and he said 'No, they're not stolen.'
>
> I said, 'Are you sure they're not stolen? Look me in the eye and tell me they're not stolen.'
>
> And he looked me in the eye and said, 'Karen, the tapes aren't hot. They're not stolen.'"

The manager—who, unbeknownst to appellant, called the police about the tapes every day thereafter until a stolen property report finally surfaced—also testified that appellant told her he had got the tapes "directly from the manufacturer." Appellant denied having said this, but offered no explanation of why the store manager (who was not a suspect) would have perjured herself.

The evidence is undisputed that the tapes were stolen, that appellant had not got them from the manufacturer, and that

they were sold at a bargain price. The cost of manufacture alone came to more than $4.50 per tape, yet the evidence showed that on at least one sale from which appellant received part of the proceeds, the truckdriver-supplier, Mr. Wesby, cleared only about $2.00 per tape—less than half the cost of manufacture and about one third the usual wholesale price. Appellant may have believed the tapes were "safe," as he testified, but the jury was entitled to be as skeptical as the store manager seems to have been about his claim that he did not know they had been stolen. That skepticism can only have been strengthened by the testimony of the FBI undercover agent to whom appellant was trying to sell refrigerators, television sets and movie tapes obtained from Mr. Wesby; although appellant denied, on the stand, that he had done so, the agent testified that appellant had told him at least some of these goods were "hot," and this was confirmed by the transcript of a surreptitious tape recording of the conversation. Taken as a whole, the evidence strongly indicated, as the government suggested in final argument, that appellant was engaged in a "pattern of illegal activity" of which the stolen tapes and the television sets, both obtained from a common source, constituted integral parts.

The evidence relating to the television sets was no more prejudicial than that relating to any of the other merchandise supplied by the truckdriver, Mr. Wesby, and it may well have been less so, given the participation of Mr. Lewis (who is an attorney) in the "five-hour" interrogation of Mr. Wesby about the TV sets. In any event, the trial judge's charge to the jury minimized any risk of prejudice:

> "You have heard evidence of the defendant's possession of goods other than the tapes involved in this case.
>
> The defendant is not on trial for activities pertaining to any goods other than the tapes.

> This evidence is admitted only as it may bear on defendant's intent, plan, knowledge, or absence of mistake or accident in this case.
>
> It is not to be used by you to prove the character of the person to show that he acted in conformity with that character."

I am by no means convinced that evidence as to the television sets would not have been admissible as part of the *res gestae* regardless of appellant's state of mind, but if a showing that appellant knew the television sets were stolen was required, I cannot agree with the court that such showing had to be "clear and convincing." The trial court charged the jury that it was the government's burden to prove, beyond a reasonable doubt, that appellant knew the *tapes* were stolen, but I do not think it follows that the government had to prove, with equal certitude, that appellant knew the *television sets* had also been stolen. See *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), where the Court of Appeals for the Second Circuit held, in an opinion written by Judge Friendly, that if "the aggregate of the evidence" is sufficient to permit a finding, beyond reasonable doubt, of criminal intent as to the crime charged, a "preponderance [of the evidence] standard is sufficient" for the subsidiary facts offered to establish such intent. 524 F.2d at 1091. The contrary view set forth in cases such as *United States* v. *Broadway*, 477 F.2d 991, 995 (5th Cir. 1973), said Judge Friendly, "appears to rest on a misconception." 524 F.2d at 1090.[1] This court itself has recently endorsed Judge

[1] Quoting other Second Circuit precedent to the effect that the trial court's determination on the prejudicial effect of "similar act" evidence "will rarely be reversed on appeal," Judge Friendly also stated that "the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." 524 F.2d at 1092. In our circuit, similarly, "[i]t is well settled that a trial judge's discretion in balancing the probative value of evidence against its potential for unfair prejudice is very broad." *United States* v. *Dabish*, 708 F.2d 240, 243 (6th Cir. 1983).

Friendly's view, citing *Leonard* in support of the proposition that "[c]ourts may admit evidence of prior bad acts if the proof shows *by a preponderance of the evidence* that the plaintiff did in fact commit the act." *United States* v. *Ebens*, — F.2d —, — (6th Cir. 1986) (emphasis supplied).

In a carefully reasoned opinion handed down by the Court of Appeals for the Fifth Circuit, sitting *en banc* soon after the Federal Rules of Evidence became effective, that court also adopted Judge Friendly's view and, overruling *United States* v. *Broadway*, 477 F.2d 991, *supra*, rejected the doctrine that evidence of similar wrong acts is admissible only if proof of their wrongness is "clear and convincing." Noting that the Federal Rules of Evidence "place greater emphasis on admissibility of extrinsic offense evidence" than the Supreme Court, acting in its rule-making role, had done earlier, the court held that:

> "The [trial] judge need not be convinced beyond a reasonable doubt that the defendant committed the extrinsic offense, nor need he require the Government to come forward with clear and convincing proof. [Footnote omitted.] The standard for the admissibility of extrinsic offense evidence is that of Rule 104(b): 'The preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist.' 21 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5054, at 369 (1977)." *United States* v. *Beecham*, 582 F.2d 898, 910 n.13 & 913 (5th Cir. 1978).

The logic of the Fifth Circuit's *en banc* decision in *Beecham* corresponds to that applied by Judge Learned Hand in *United States* v. *Brand*, 79 F.2d 605 (2d Cir. 1935), *cert. denied*, 296 U.S. 655 (1936). In *Brand*, which affirmed a conviction for transporting a stolen automobile, the court flatly rejected the doctrine "that evidence of the receipt of other stolen goods is not admissible unless the prosecution proves that the

accused knew them to have been stolen." *Id.* at 606. The competence of evidence of other similar acts "does not depend upon conformity with *any* fixed conditions, such as upon direct proof of scienter," Judge Hand wrote: "[t]he [trial] judge must decide each time whether the other instance or instances form a basis for sound inference as to the guilty knowledge of the accused *in the transaction under inquiry*: that is all that can be said about the matter." *Id.* (emphasis supplied). In a passage highly pertinent to our case, where the evidence showed that the television sets, Memorex videotapes, refrigerators and movie tapes in which appellant was dealing all came from the same truckdriver-supplier, Judge Hand went on to say that "[i]f, for example, the subject of the indictment were the last of a series of purchases *from the same thief*, the earlier purchases would be competent, for thieves are unlikely to risk repeated transactions with innocent buyers." *Id.* (emphasis supplied).

I would follow these well-reasoned decisions in preference to the contrary view adopted, initially, in some other circuits before the Federal Rules of Evidence came into existence. The contrary view seems to have been based on concerns now dealt with—adequately, in my judgment—in Rule 403 of the Federal Rules of Evidence.

Finally, if the trial court did err in this case by letting the jury know about the television sets, I am convinced that the error was harmless. It should be emphasized in this connection that appellant does not contend, and the record does not suggest, that the trial court's allegedly erroneous evidentiary ruling presents any *constitutional* question. *Chapman* v. *State of California*, 386 U.S. 18 (1967), dealt only with error of constitutional dimension, and it is only constitutional errors that cannot be deemed harmless unless harmless "beyond a reasonable doubt." 3A C. Wright, *Federal Practice and Procedure: Criminal 2d* § 855, at 335 (1982); *Connecticut* v. *Johnson*, 460 U.S. 73, 88, n.2 (1983) (Stevens, J., concurring in the judgment).

> "The test announced in *Chapman* for determining when a constitutional error is harmless is more exacting than the test for harmlessness of errors that are not of constitutional dimension. The courts have not yet followed the lead of some commentators who argue that a single test should apply to both constitutional and non-constitutional error." C. Wright, *supra*, § 855, at 335.

After a careful reading of the entire record, I am not persuaded that the facts of this case should prompt us to hold —as no other Federal Court of Appeals seems to have done —that non-constitutional error must be found harmless "beyond a reasonable doubt" before a conviction may be affirmed.

I believe one can say here, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Only this is required for affirmance of the conviction. *Id.* The conduct of the trial judge in this case was impeccable, the jury obviously bent over backward to be fair, and I see no reason for this court to require that appellant be retried.

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GUY RUFUS HUDDLESTON
Defendant

Docket No.
85-CR-90013-01-AA

In the presence of the attorney for the government the defendant appeared in person on November 7, 1985.

WITH COUNSEL, Donald Ferris.

There being a verdict of **NOT GUILTY**. Defendant is discharged on Count I of Indictment.

There being a verdict of **GUILTY** on Count II of Indictment.

Defendant has been convicted as charged of the offense(s) of COUNT II: POSSESSION OF STOLEN GOODS, 18:USC:659 as charged in the INDICTMENT.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that. The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year.

Defendant's Bond is continued to January 2, 1986 at which time defendant shall report to the designated institution on or before 2:00 p.m. in the afternoon. Bond will be cancelled at time defendant appears at designated institution on January 2, 1986.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to the Victim Protection Act P.L. 97-291, defendant must pay a total of $2,345.00 restitution to Overnight Express Trucking Company, Newport, Minnesota and The Great West Casualty Company, S. Sioux City, Nebraska jointly.

APPENDIX E

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period or probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, that Probation Department provide necessary information regarding the residence program. If defendant qualifies, then defendant is to be assigned to the C.C.C. Residential Program in Detroit.

(s) CHARLES W. JOINER

U.S. District Judge

Date November 12, 1985

OPPOSITION

BRIEF

No. 87-6

In the Supreme Court of the United States

OCTOBER TERM, 1987

GUY RUFUS HUDDLESTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
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QUESTION PRESENTED

Whether, before admitting "similar acts" evidence under Fed. R. Evid. 404(b), a district court must find that the "similar acts" have been proved by clear and convincing evidence.

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. C1-C9) is reported at 811 F.2d 974. The initial opinion of the court of appeals (Pet. App. D1-D16) is reported at 802 F.2d 874.

JURISDICTION

The initial judgment of the court of appeals was entered on October 8, 1986. After the government filed a petition for rehearing, the court entered a new judgment on February 26, 1987, withdrawing the prior judgment and opinion and affirming petitioner's conviction. Petitioner's petition for rehearing was denied on April 30, 1987. The petition for a writ of certiorari was filed on June 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possessing stolen property in interstate com-

merce, in violation of 18 U.S.C. 659. He was sentenced to one year's imprisonment and ordered to make restitution. The court of appeals initially entered a decision reversing the conviction (Pet. App. D1-D16), but after the government filed a petition for rehearing, the court vacated that decision and affirmed the conviction (*id.* at C1-C9).

1. The evidence at trial, which is recounted in the initial opinion of the court of appeals (Pet. App. D2-D3), showed that in early 1985, the Tandy Bell & Howell company manufactured and sold a number of Memorex video cassette tapes to Memtech Products of Arlington Heights, Illinois. Memtech in turn sold the blank tapes to the K-Mart Corporation of Michigan for $4.69 per tape. Memtech arranged to ship 32,448 tapes to K-Mart via an Overnight Express semi-trailer truck. The trailer was sent to a trailer yard in South Holland, Illinois, because K-Mart was not scheduled to take delivery of the tapes until April 16, 1985. On April 15, Overnight Express employees discovered that the trailer was missing.

On April 17, 1985, petitioner, a local housing contractor, informed Karen Curry, the manager of the Magic Rent-to-Own appliance store in Ypsilanti, Michigan, that he wanted her to help him sell a truckload of blank videotapes. When Curry asked whether the tapes were stolen, petitioner replied that they were not. He told Curry that he had purchased the tapes directly from the Chicago manufacturer for $1 per tape and that he possessed a bill of sale. In fact, petitioner had obtained the tapes directly from truckdriver Leroy Wesby. Petitioner told Curry that he wanted her to sell the tapes in lots of 500 for $2.75 to $3 per tape.

Curry arranged for the sale of 5,000 tapes to various local retailers. Petitioner also sold 500 tapes to a local retailer for $1,500 and provided the purchaser with a receipt. Petitioner used his own name in every transaction and instructed Curry that he would be responsible for any

damaged or defective tapes. Petitioner paid Curry twenty-five cents per tape for arranging the sales. The FBI subsequently contacted Curry and told her that the tapes were stolen.

2. Petitioner was arrested, together with Wesby, and was charged with possessing and selling stolen goods. As part of its effort to establish that petitioner knew the tapes were stolen, the government offered evidence that petitioner had engaged in a pattern of dealing in goods of suspicious origin. First, the government produced evidence that, about a month before the charged offense, petitioner sold approximately 40 black and white television sets to a record store owner for $28 each, and that he also offered to sell the record store owner a number of blank video cassette tapes. The government did not present any direct evidence that the television sets were stolen; instead, it relied on the inferences that could be drawn from petitioner's inability to produce a bill of sale and the unusually low price for which petitioner sold the television sets. Second, the government produced evidence that on May 1, 1985, petitioner offered to sell an undercover FBI agent 10,000 video cassette movies for $1.57 per tape and a quantity of color television sets for $200 per set. When the agent asked petitioner whether any of those items were stolen, petitioner replied either that "some are hot and some are not" or that most of the tapes "were not hot." Petitioner also offered to sell the agent a quantity of Amana refrigerators, ranges, and icemakers. The Amana appliances were part of an interstate shipment that had been reported stolen. Pet. App. D3-D4.

The government disclosed its intention to present this "similar act" evidence through a pretrial motion *in limine*. Over petitioner's objection, the district court ruled that the evidence would be admitted. At trial, petitioner denied

knowing that the goods he sold were stolen.[1] The court instructed the jury that the "similar act" evidence was admitted only to show petitioner's intent, plan, knowledge, or absence of mistake or accident and that the jury could not consider that evidence to establish petitioner's character or to establish that he acted in conformity with that character. At the conclusion of the trial, the jury convicted petitioner of possessing 500 stolen video cassette tapes, but acquitted him of the charge of selling stolen tapes. See Pet. App. D12-D13 (Nelson, J., dissenting).

2. The court of appeals, by a divided vote, initially reversed petitioner's conviction. Pet. App. D1-D16. The court concluded that the district court abused its discretion by admitting evidence of petitioner's sale of television sets to the record store owner. It reasoned that the evidence was unduly prejudicial because the government failed to show by clear and convincing evidence that the television sets were stolen or that petitioner knew they had been stolen.[2] The court also held that the error of admitting that evidence was not harmless beyond a reasonable doubt. *Id.* at D6.[3]

Judge Nelson dissented. In his view, the admission of the television set evidence was not unfairly prejudicial. He further stated that Fed. R. Evid. 404(b) permits the admission of "similar act" evidence upon a showing that it is

[1] In addition, Alphonse Lewis, an attorney and the owner of the "Magic Rent-to-Own" store, testified that he purchased 500 of the television sets from Wesby for resale, and that Wesby gave him a bill of lading after Lewis raised questions about the origin of the television sets. Lewis did not produce the bill of lading at trial. See Pet. App. D9-D10 (Nelson, J., dissenting).

[2] Government counsel conceded at oral argument that the government's proof of these issues did not rise to the level of being "clear and convincing." Pet. App. D6.

[3] The court responded to the government's contention that petitioner had failed to preserve the issue for appeal by holding that the admission of the television set evidence was plain error. Pet. App. D7.

more likely than not that petitioner committed the acts and that the government satisfied this "preponderance of the evidence" standard by showing that petitioner obtained all of his goods—including some that he admitted were "hot"—from the same supplier. Even if the admission of the "similar acts" evidence was error, Judge Nelson concluded that, under the nonconstitutional harmless error test, the admission of the television set evidence was harmless. Pet. App. D9-D16.

On rehearing, the court of appeals vacated its initial judgment and affirmed the conviction. The court first held that Fed. R. Evid. 404(b) permits the admission of "similar act" evidence under a preponderance of the evidence standard, citing the court's recent decision in *United States* v. *Ebens*, 800 F.2d 1422 (6th Cir. 1986). It next held that the government met that standard in this case because petitioner obtained all of the goods from the same supplier; he did not ascertain the source of the goods or ask to examine the supplier's bill of sale; and he offered to sell his goods at prices well below their value or even, in the case of the tapes, below the cost of their manufacture. Furthermore, petitioner admitted that some of the goods were "hot." The court also concluded that the district court's limiting instruction concerning the jury's use of the "similar act" evidence minimized any possibility of prejudice. Finally, the court concluded that any error in the admission of the evidence was harmless because the judgment was not substantially affected by that evidence. Pet. App. C1-C9.

DISCUSSION

Rule 404(b) of the Federal Rules of Evidence provides that evidence of "other crimes, wrongs, or acts" is not admissible to prove the character of a person in order to show that he acted in conformity with that character on a particular occasion. The Rule provides, however, that

such "similar act" evidence[4] is admissible for other purposes, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). Petitioner contends (Pet. 6-15) that the district court misapplied Rule 404(b) in this case because it admitted evidence that petitioner previously possessed television sets obtained from Wesby without first requiring the government to show by clear and convincing evidence that the sets were stolen.

1. Petitioner correctly observes (Pet. 6-10) that there is a conflict among the courts of appeals over the standard to be applied in determining when "similar act" evidence may be admitted. In particular, the courts are divided on the issue of what standard of proof the government must satisfy as a preliminary matter in showing that the defendant committed the "other crimes" in question. The Seventh, Eighth, Ninth, and District of Columbia Circuits require the government to prove by clear and convincing evidence that the defendant committed the acts that are

[4] For shorthand purposes, we refer to the evidence that is the subject of Rule 404(b) as "similar act" evidence. That evidence is sometimes referred to as "other crimes" evidence or "bad acts" evidence. The Rule makes clear, however, that the evidence to which the Rule is addressed is not limited to evidence of criminal conduct, or for that matter, evidence of bad conduct of any sort. Rather, the Rule prohibits the introduction of any evidence that is offered for the purpose of proving a person's character in order to suggest that the person acted in accordance with that character on an occasion that is at issue at trial. See *United States* v. *Roe*, 670 F.2d 956 (11th Cir.), cert. denied, 459 U.S. 856 (1982); *United States* v. *Miller*, 573 F.2d 388 (7th Cir. 1978); *United States* v. *Evans*, 572 F.2d 455 (5th Cir.), cert. denied, 439 U.S. 870 (1978). We also refer to the person who is the subject of the evidence at issue under Rule 404(b) as the defendant, since litigation under the Rule arises most often when "similar act" evidence is offered against the defendant in a criminal case. Nonetheless, the Rule also applies in civil cases and to persons other than the defendant in criminal cases.

offered into evidence under Rule 404(b). See *United States* v. *Leight*, 818 F.2d 1297, 1302 (7th Cir. 1987); *United States* v. *Weber*, 818 F.2d 14 (8th Cir. 1987); *United States* v. *Vaccaro*, 816 F.2d 443, 452 (9th Cir. 1987); *United States* v. *Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985). The Second, Fourth, Fifth, and Eleventh Circuits have refused to require the government to meet that standard of proof before admitting "similar act" evidence. See *United States* v. *Leonard*, 524 F.2d 1076, 1090-1091 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *United States* v. *Martin*, 773 F.2d 579, 582 (4th Cir. 1985); *United States* v. *Beechum*, 582 F.2d 898, 913 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States* v. *Dothard*, 666 F.2d 498, 502 (11th Cir. 1982). Among the courts that have rejected the "clear and convincing evidence" test, the Second Circuit and the court below have required the government to establish the commission of the "similar acts" by a preponderance of the evidence. See, *e.g.*, *United States* v. *Leonard*, 524 F.2d at 1091; *United States* v. *Ebens*, 800 F.2d 1422, 1432 (6th Cir. 1986); Pet. App. C4. Other courts that have rejected the "clear and convincing evidence" test have held that the "similar act" evidence is admissible as long as the evidence of the "similar act" is sufficient to permit the jury to find that the defendant committed the act. See, *e.g.*, *United States* v. *Martin*, 773 F.2d at 582; *United States* v. *Beechum*, 582 F.2d at 914; see also *United States* v. *D'Alora*, 585 F.2d 16, 20 (1st Cir. 1978) (citation omitted) ("all that is needed is a showing that the evidence 'tended to logically associate appellant with that particular crime' ").

The conflict among the circuits on this issue is well established and appears unlikely to be resolved without this Court's intercession. Moreover, the issue is an important one. Questions regarding the admissibility of "similar

act" evidence under Rule 404(b) arise in district courts every day. The question of how the admissibility of such evidence should be determined is therefore of great practical significance to the administration of criminal justice in the federal system. For that reason, we do not oppose the petition for a writ of certiorari in this case. We believe that this case presents an appropriate opportunity for the Court to address and resolve the question of what, if any, preliminary showing the government must make in order to obtain the admission of "similar act" evidence under Rule 404(b).[5]

[5] Although the matter is not free from doubt, we believe that petitioner has preserved this issue for review even though he did not object to the television set evidence when it was admitted at trial. The government raised the issue in a motion *in limine* prior to trial, and the district court ruled the evidence admissible at that time. To be sure, an objection during a pretrial hearing is often regarded as insufficient, standing by itself, to preserve an issue for appeal. See, *e.g.*, *United States* v. *Griffin*, 818 F.2d 97, 102-106 (1st Cir. 1987); *United States* v. *Roenigk*, 810 F.2d 809, 815 (8th Cir. 1987); *United States* v. *DiPaolo*, 804 F.2d 225, 233 (2d Cir. 1986); *United States* v. *Johnson*, 767 F.2d 1259, 1270 (8th Cir. 1985); *United States* v. *Wolfe*, 766 F.2d 1525, 1526-1527 (11th Cir.), cert. denied, 475 U.S. 1066 (1985). Several courts, however, have held that general rule inapplicable where, as here, the district court's ruling on a motion *in limine* constitutes the definitive and final ruling on the issue; where that ruling is not affected by the evidence at trial; and where an objection at trial would be a mere formality. See *Palmerin* v. *City of Riverside*, 794 F.2d 1409, 1411-1413 (9th Cir. 1986); *Sprynczynatyk* v. *General Motors Co.*, 771 F.2d 1112, 1118-1119 (8th Cir.), cert. denied, 475 U.S. 1046 (1985); *American Home Assurance Co.* v. *Sunshine Supermarket, Inc.*, 753 F.2d 321, 324-325 (3d Cir. 1985). In light of those authorities, and because the court of appeals reached and decided the question in an opinion that will be binding in that circuit, we believe the question is properly presented, and we do not press the contention that petitioner failed to preserve his challenge to the admission of the television set evidence by failing to renew his objection to that evidence at the time it was admitted at trial.

2. In our view, neither the "clear and convincing evidence" test nor the "preponderance of the evidence" test has any proper role in determining the admissibility of "similar act" evidence. Neither the language of Rule 404(b) nor the policies underlying the Rule justify threshold tests of that sort that would bar relevant evidence from the jury's consideration.

Rule 404(b) contains no express provision requiring a preliminary showing as to the strength of the proffered evidence. Rather, the Rule merely provides that evidence may not be admitted for the purpose of proving a person's character, in order to show that he acted in accordance with that character on a particular occasion. Except for that prohibited use, the Rule authorizes the admission of "similar act" evidence for any other purpose, subject only to the ordinary principles of relevance. *United States* v. *D'Alora*, 585 F.2d at 20; see Fed. R. Evid. 401, 403. Thus, the plain language of Rule 404(b) gives no support to the decisions that have read into the rule a requirement that when offering "similar act" evidence, the government must establish by either clear and convincing evidence or a preponderance of the evidence that the defendant committed the acts in question.

Nor would the adoption of such threshold screening devices promote the policies underlying Rule 404(b). As the Advisory Committee's Note on the proposed version of Rule 404(b) makes clear, the purpose of the Rule was to ensure the admission of relevant evidence, such as "similar act" evidence, except when the evidence was offered for the prohibited purpose of showing propensity based on character, and except when the probative value of the evidence was outweighed by the danger of undue prejudice, see Fed. R. Evid. 403. Note of Advisory Committee on Proposed Rules, 28 U.S.C. App. Rule 404, at 690-691. The House and Senate Reports on the Federal Rules of Evidence both emphasized that the new rule was intended

to promote the admission of "similar act" evidence and to exclude such evidence, when offered for a proper purpose, only on the grounds set forth in Rule 403. See S. Rep. 93-1277, 93d Cong., 2d Sess. 24-25 (1974); H.R. Rep. 93-650, 93d Cong., 1st Sess. 7 (1973); see also *United States* v. *Sangrey*, 586 F.2d 1312, 1314 (9th Cir. 1978); *United States* v. *Fosher*, 568 F.2d 207, 212 (1st Cir. 1978); *United States* v. *Long*, 574 F.2d 761, 766 (3d Cir.), cert. denied, 439 U.S. 985 (1978).

Thus, the language and legislative history of Rule 404(b) suggest that Congress intended for the courts to treat "similar act" evidence that is offered for a proper purpose the same as any other evidence with regard to the issue of relevance. If the evidence is relevant to a material issue in the case, Fed. R. Evid. 401, and if the probative value of the evidence is not outweighed by its prejudicial effect, Fed. R. Evid. 403, it should be admitted. See Fed. R. Evid. 402.

Of course, an inquiry into the logical relevance of "similar act" evidence requires the court to make a preliminary determination that there is a basis on which a jury could find that the defendant is the person who committed the act in question. There is nothing special about that kind of inquiry, however, and it is certainly not unique to cases involving Rule 404(b). To the contrary, that kind of inquiry must be made, explicitly or implicitly, in the case of every piece of evidence whose relevance is challenged at trial. For example, evidence that a person was seen running from a bank after a robbery is ordinarily not relevant in a bank robbery prosecution unless there is some basis for the jury to conclude that the person who was running was the defendant (or an accomplice). Before admitting such evidence, the court must consider whether there is any basis for the jury to conclude that the defendant was the person seen fleeing from the bank. The court must make the same inquiry in the case of "other

crimes" evidence by determining whether there is any basis on which the jury could find that the defendant is the person who committed the acts in question. But that inquiry is much less exacting than an inquiry that must satisfy the "clear and convincing evidence" standard or an inquiry that must establish by a "preponderance of the evidence" that the defendant was guilty of a particular criminal act.

In sum, we submit that there is no need to create a special standard of proof to be applied to "similar act" evidence, as some courts have done. The proper course for a district court in addressing "similar act" evidence is simply to determine whether there is a sufficient connection between the proffered evidence and the issues in the case to make the evidence relevant under ordinary principles of relevance. To require a court to make a finding that the defendant committed the conduct in question—either by a preponderance of the evidence or by clear and convincing evidence—would create a special and restrictive standard of relevance for "similar act" evidence that Congress did not intend to impose. To the extent that special protection is needed against the danger that a defendant will be prejudiced by the impact of powerful "similar act" evidence, that protection is provided by the district court's responsibility to balance the probative value of the evidence against its prejudicial impact under Fed. R. Evid. 403, and by limiting instructions to the jury regarding the proper uses that can be made of the "similar act" evidence. See *United States* v. *Beechum*, 582 F.2d at 911, 913-916.

Because we believe that the analysis outlined above is consistent with Congress's intent when it enacted Rule 404(b), and because several courts of appeals have rejected that analysis in favor of a more restrictive approach, we believe that this Court's review of this important evidentiary issue is warranted. We accordingly do not oppose the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

THOMAS E. BOOTH
Attorney

SEPTEMBER 1987

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JOINT APPENDIX

No. 87-6

In the Supreme Court of the United States

October Term, 1987

GUY RUFUS HUDDLESTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 27, 1987
CERTIORARI GRANTED OCTOBER 13, 1987

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The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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RELEVANT DOCKET ENTRIES

1985

July 24 Indictment filed in the United States District Court for the Eastern District of Michigan, and assigned to the Honorable Charles W. Joiner in Ann Arbor, Case No. 85-CR-90013-AA-01.

Aug. 23 Petitioner is arraigned with counsel, enters a not guilty plea, and is released on $20,000 personal appearance bond. Counsel is Benjamin H. Logan II. Government's counsel is AUSA Phyllis M. Golden.

Sept. 12 Pre-trial conference held.

Sept. 16 Pre-trial conference summary order.

Oct. 17 Trial begins. Government makes motion *in limine* to admit similar acts evidence under Fed. R. Evid. 404(b), which is granted by court over Petitioner's objection. Jury impaneled; testimony begins.

Oct. 18 Trial continues.

Oct. 22 Trial continues, testimony ends, closing arguments presented, and final instructions to the jury given. Jury begins deliberations at 12:35 p.m.

Oct. 23 Deliberations continue. Jury reaches verdict at 4:35 p.m. Count One: The jury finds Petitioner not guilty. Count Two: The jury finds Petitioner guilty.

Nov. 7 Attorney Don Ferris is substituted as counsel for Petitioner. Sentencing of Petitioner on Count Two. Sentenced to one year imprisonment to be served in the Community Corrections Center in Detroit. Petitioner to surrender to the Designated Institution on January 2, 1986.

Nov. 12 Judgment of Acquittal of Count One, and of Conviction of Count Two filed in District Court.

Nov. 13 Petitioner's Notice of Appeal filed in the District Court.

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Jan. 2 Petitioner reports to designated institution.

Apr. 2 Petitioner's Motion for Bail Pending Appeal filed in District Court.

Apr. 15 Government's Answer in Opposition to Motion for Bail Pending Appeal filed in District Court.

May 28 Motion for Bail Pending Appeal granted by District Court. Bail set at $10,000 personal bond.

Aug. 8 Oral Argument in the Sixth Circuit Court of Appeals, Case No. 85-1938.

Oct. 8 Opinion of the Sixth Circuit Court of Appeals Reversing Judgment of Conviction and Remanding is filed.

1987

Feb. 20 Opinion of the Sixth Circuit Court of Appeals Granting Government's Petition for Rehearing, Vacating earlier Opinion, and Affirming Judgment of Conviction is filed.

Apr. 30 Order of the Sixth Circuit Court of Appeals Denying Petitioner's Petition for Rehearing En Banc is filed.

June 1 Order of the Sixth Circuit Court of Appeals Granting Petitioner's Motion to Stay Mandate Pending Application to the United States Supreme Court for Writ of Certiorari is filed.

June 27 Petition for Writ of Certiorari is filed in the United States Supreme Court.

Sept. 11 Government's Answer to Petition for Writ of Certiorari is filed in the United States Supreme Court.

Oct. 13 Certiorari is Granted by the United States Supreme Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CRIMINAL NO. 85-90013M

-vs-

VIO: 18 U.S.C. § 659 & 2315

GUY RUFUS HUDDLESTON,

Defendant.

Charles Joiner

_____/

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

(18 U.S.C. § 2315 -
Selling Stolen Goods)

That on or about April 19, 1985, (at Flint, Michigan,)—(deleted by Court during trial) in the Eastern District of Michigan, Southern Division, GUY RUFUS HUDDLESTON, defendant herein, did knowingly, wilfully and unlawfully sell goods valued in excess of $5,000.00, said goods consisting of 4,000 Memorex Pro-Series T-120 VHS blank tapes, which goods were moving as and were a part of interstate commerce from Arlington Heights, Illinois to Plymouth, Michigan. Knowing the same to have been stolen on or about April 22, (changed by court during trial to April 12), 1985, in violation of Section 2315, Title 18, United States Code.

COUNT TWO

(18 U.S.C. § 659 -
Possession of Stolen Goods)

That on or about April 30, 1985, at Livonia, Michigan, in the Eastern District of Michigan, Southern Division, GUY RUFUS HUDDLESTON, defendant herein, did knowingly, wilfully and unlawfully have in his possession goods valued in excess of one hundred dollars ($100.00), that is, 500 Memorex VHS cassette tapes, which had been stolen from a trailer while said goods were moving as, were a part of, and constituted an interstate shipment of freight or other property from Arlington Heights, Illinois to Plymouth, Michigan, knowing the same to have been stolen, in violation of Section 659, Title 18, United States Code.

THIS IS A TRUE BILL.

/s/ Illegible
FOREPERSON

JOEL M. SHERE
United States Attorney

/s/ Phyllis M. Golden
PHYLLIS M. GOLDEN
Assistant United States Attorney

DATED: 7-23-85

(p 4) TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION IN ANN ARBOR

Transcript of Government's Motion in Limine to Admit Similar Acts Evidence under Fed. R. Evid. 404(b), Petitioner's Objections, and Trial Court's Ruling Admitting Such Evidence.

October 17, 1985 8:35 A.M.

CLERK OF THE COURT: The United States versus Guy Rufus Huddleston, case number 85-90013.

MS. GOLDEN: Good morning, your Honor. Phyllis Golden appearing on behalf of the United States.

THE COURT: Ms. Golden.

MS. GOLDEN: Your Honor, the defendant's attorney, Mr. Logan, was just outside talking.

THE COURT: Well, why don't we get him and let's see if there's anything we have to take up before we call the jury down.

Are there any matters we ought to take up on this before we call the jury in here?

MS. GOLDEN: Your Honor, the Government intends to introduce similar acts on behalf of—

THE COURT: I can't hear you.

MS. GOLDEN: The Government intends to introduce similar acts. The defendant is charged with possession and selling of stolen goods, goods that were stolen from an interstate shipment.

We have testimony, as to statements that the defendant made, pertaining to the sale of (p 5) television sets, V.H.S. movie cassettes and refrigerators and we intend to introduce similar acts testimony, but through witnesses who had conversations with the defendant for the sale of these items.

THE COURT: Counsel?

MR. LOGAN: Yes, your Honor. I would oppose any similar acts. The defendant has a prior charge involving some refrigerators that is scheduled for the 28th and 29th of this month.

I believe that to attempt to introduce those particular acts, would be highly prejudicial, wherein the defendant is presently charged, and there has not been any determination as to guilt or innocence as to those charges.

So, it is our position that the prosecution—U.S. attorneys should be limited in terms of their scope to this charge, this offense, these items specifically.

THE COURT: What is the argument that you're making, by way of defense, in this particular matter?

MR. LOGAN: Well, in terms of our defense, the defendant's defense is that he did not know the items that he sold were stolen. And that's essentially what his defense is going to be.

(p 6) With reference to muddying the water with other items, we're effectively having two trials in one.

THE COURT: Well—

MR. LOGAN: And they've already issued an indictment on the refrigerators. If they were going to do that, then we should have one trial on all of it.

THE COURT: Do you want to do that, have one trial on all of it?

MR. LOGAN: No. The stage has already been set for two trials. So, therefore, that's what we have.

THE COURT: What is the theory on which you want to introduce the similar acts?

MS. GOLDEN: Your Honor, the Government intends to introduce it to show intent, motive and opportunity.

The basis for—

THE COURT: How does it—let's take these up one at a time. How does it show opportunity?

MS. GOLDEN: Your Honor—

THE COURT: Opportunity only.

MS. GOLDEN: Okay.

THE COURT: You used the term "opportunity" and I want to know how it shows opportunity.

(p 7) MS. GOLDEN: It shows the defendant had the opportunity to make stolen goods available, in light of the fact that by his own statements to these other individuals, he indicates that he has truckloads of other types of shipments, which he's offering for sale at a substantially low price, at less than one-third of their value.

Therefore, these items, having been made offered for sale within a one to two week period, during the time in

which he made the cassette tapes for sale that are charged in this particular indictment, shows that he had the opportunity to have access to these goods.

THE COURT: Opportunity for access to the tapes?

MS. GOLDEN: As well as refrigerators and television sets.

THE COURT: We're not trying the refrigerators now. We're dealing with the elements of this particular crime. Which one would be—is this under the sale or under the possession count, that they are relevant under?

MS. GOLDEN: Sensibly both, your Honor. But particularly the sale, since the other similar acts that the Government would seek to introduce—the (p 8) basis for the similar acts, were improper, of the sale of refrigerators and tapes.

THE COURT: Which element of the crime does it relate to?

There are five elements of the crime: that the tapes were stolen; that the tapes had a value of $5,000; that the tapes, having been stolen, but before sale, had moved from one state to another; that defendant wilfully sold and disposed of the tapes after they had moved in interstate commerce; and the defendant knew that the tapes were stolen.

MS. GOLDEN: The latter two elements, your Honor, that he sold them and that he knew that they were stolen.

THE COURT: And what is the other act that you say has a bearing upon that?

MS. GOLDEN: Approximately five days after the possession of the tapes that are charged in count two, the defendant met an undercover F.B.I. agent and solicited and arranged the sale of refrigerators, ranges and icemakers.

He sold these items—as Mr. Logan has stated. these are the items that are charged in the second indictment which is scheduled for trial on the 28th.

(p 9) THE COURT: He said these were stolen goods; did he?

MS. GOLDEN: No, he did not say they were stolen goods, your Honor. He merely stated that he had gotten them off the dock in Chicago and that he and his crew had access to unload these items—these appliances from the dock and he purported to sell them at approximately one-third of their value.

THE COURT: And you say that is the word—the word you want to show, that is under 504, is what you're dealing with.

MS. GOLDEN: 504b, your Honor. And I cite the *United States* versus *Falco*, 727 Fed 2nd 659, a 9th Circuit 1984 decision, in which the court discussed the use of both prior and subsequent similar acts when they are very related in time to the acts that are charged in the indictment.

> THE COURT: "Evidence of other crimes or wrongful acts is not admissible to prove the character of a person to show the act of performing it, but, it may be admissible for purposes such as motive . . ."

That's not it; right?

MS. GOLDEN: No.

THE COURT: ". . . opportunity . . ."

(p 10) MS. GOLDEN: Opportunity. That is correct, your Honor.

THE COURT: ". . . intent . . ."

MS. GOLDEN: Intent is another basis upon which we intend to introduce the acts.

THE COURT: You use three words. One is preparation?

MS. GOLDEN: No, your Honor.

THE COURT: Plan?

MS. GOLDEN: No, your Honor.

THE COURT: That is part of the same plan. Knowledge?

MS. GOLDEN: Knowledge to the extent that knowledge pertains to the stolen nature of the goods.

THE COURT: Identity?

MS. GOLDEN: No.

THE COURT: Absence of mistake or accident?

MS. GOLDEN: Basically, we think that's the other side of intent.

THE COURT: I think in light of the fact that it is contended to this case, that there was no knowledge in fact that these tapes were stolen, this evidence does have

clear relevance as to this point and I would allow the evidence to come in.

(p 429) TRANSCRIPT OF COURT'S FINAL INSTRUCTION TO JURY CONCERNING SIMILAR ACTS EVIDENCE

October 22, 1985

28. You have heard evidence of the defendant's possession of goods other than the tapes involved in this case.

The defendant is not on trial for activities pertaining to any goods other than the tapes.

This evidence is admitted only as it may bear on defendant's intent, plan, knowledge, or absence of mistake or accident in this case.

It is not to be used by you to prove the character of the person to show that he acted in conformity with that character.

TRANSCRIPT OF PORTIONS OF KAREN CURRY'S TESTIMONY

October 17, 1985

(p 72) (By AUSA Golden)

Q Did there come a time when Mr. Huddleston approached you about assisting him in selling tapes?

A Yes.

Q Could you tell us when, approximately, this occurred?

A This was approximately April of '85.

Q Where were you you [sic] when he approached you?

A At Magic Rent-To-Own, in the store. This was during the normal business hours.

Q Could you tell the members of the jury, what transpired between you, in terms of conversations?

A He just came in the office and said—he said, "I have a good deal cookin. I have some tapes."

Approximately, I asked him how many. At the time, I can't recall if he gave me the figure of 20,000 or if that came later.

And he stated he had some tapes. And he went out to the car and got some tapes and showed me the box and showed me what was in there and he asked me if I wanted to help sell them.

(p 73) I ask him, I said, "Guy," I said, "are they stolen?" And he said, "No, they're not stolen."

I said, "Are you sure they're not stolen? Look me in the eye and tell me they're not stolen."

And he looked me in the eye and said, "Karen, the tapes aren't hot. They're not stolen."

Okay, and I asked him where he got the tapes from and he said, "Directly from the manufacturer." And basically, that's about it.

Q Did he state what he paid for the tapes that he received directly from the manufacturer?

A If I recall correctly, it was about a dollar per tape. A dollar, at least.

Q Did you ask him whether he had a bill of sale for these tapes?

A Yes, I did. I asked him if he had a bill of sale and he said he did have one and that was it.

He said, "I have a bill of sale. That's no problem."

Q Did you ever see that bill of sale?

A No, I did not.

Q After he assured you that those tapes weren't stolen, what did he ask, in terms of your assistance?

A He asked me if I could try to make some contacts to sell the tapes for him. He would pay me for doing it.

(p 74) And I asked him if there was any place specific he wanted me to sell the tapes. He said, no there was no place specific. Just, you know, anybody that would take them.

I said that should be easy to do at that price. I asked him what he wanted them to go for, which was 2.75 or $3,

approximately. I'm not sure—I can't recall correctly right off, but it was around that figure. And so, I began making some calls for him.

Q What types of tapes were these?

A These were the Memorex Pro Series T-120 V.H.S. tapes.

Q These are the tapes that are used in a video recorder?

A That's correct.

Q Do you have any knowledge about the retail price for these tapes?

A No.

Q Does Magic Rent-To-Own sell them?

A No, we don't.

Q Did you make calls to try to find people to purchase the tapes?

A Yes, I did.

Q Do you remember who you called?

A Let's see. I called Showtime—I can't remember the cities that these places were in—but I called (p 75) Showtime, Curtis Mathis, New York Video World and a couple other places that I can't recall.

Q Before making any attempts to call these people to purchase these tapes, did you make any attempts yourself, to determine whether the tapes were stolen?

A Yes, I did.

I had Officer Chan, of the Ypsilanti Police Department, make a check on those tapes. And he did that the same day in the office when he had the tape at Magic Rent-To-Own, with me.

The tapes came up. There was nothing. They weren't stolen and there was no record on them.

So, he said that he would get back with me if he heard anything wrong about them being stolen, but I should have no problem with them as long as—as long as they weren't listed as stolen.

Q When did you make this inquiry of Officer Chan?

A The same day that Guy let me take—he left me the box of tapes and that's the same day he came in the office because he worked in that area, Officer Chan did.

And he came in and I wanted to make sure that I wasn't getting into anything over my head. So, I did check it out.

Q Did Mr. Chan, at any later time, inform you that the (p 76) tapes were stolen?

A He came in daily until he had—he had a day off and I hadn't seen him for two days. But when he came back, I asked him and he said, "No."

Q No reports?

A No.

Q When you were instructed by Mr. Huddleston to arrange for the sale of the tapes, were there any special conditions?

A I don't know if it should be special conditions, but I know that he did want no checks. Just cash for the tapes.

Q Any suggestion about the quantity of tapes that you should sell?

A Not less than five hundred tapes to any one person or—

Q Did he indicate the reason for that?

A He didn't want to make too many little individual stops to deliver the tapes.

Q How did you obtain the telephone numbers of the places that you called?

A By going through the yellow pages, in the phone book.

Q And when you called a dealer, what did you say?

A I said—I told them I was from Magic Rent-To-Own and I was a manager there and we had some V.H.S. tapes.

I told him what type of tapes that we had and I told them that—I told them that they couldn't take (p 77) less than five hundred, that we had an overstock of the V.H.S. tapes and we had received an overstock on tapes.

We didn't carry the blank tapes in our store, but it was at a good price, so we were going to go ahead and sell them ourselves. And if there was—and the people that wanted to know—that I called—they wanted to know what if we take a large shipment of tapes and there's a problem with it, where do we send it back if it's defective. I told them, "You can send it right back to Magic Rent-To-Own. There's no problem."

Q Why did you tell them that?

A Because Guy said he would take care of it. It should be no problem. He said if they came back, he would handle it from there.

Q Did you ever ask Mr. Huddleston why he wanted you to arrange for the sales, rather than him doing it himself?

A Not really. No, I didn't. No, I didn't.

Q Had you made phone calls for him before?

A That's why. Yeah, I had. Because if he came in and—not really made phone calls for him. I took messages for him and I would call him and let him know that he had someone that wanted to meet with him or something, once in awhile. And it wasn't real unusual for him to (p 78) ask me to do this.

Q Did you arrange for the purchase of any tapes?

A I'm sorry?

Q Did you, in making your phone calls, arrange for the purchase of any? Did you have any people who said they were interested?

A Yes. Curtis Mathis was one of them and I'm not sure, I think it was Movieland that did take some of the tapes.

Q Once you spoke with the person and they said they were interested, who made the arrangements for the delivery and the payment?

A Guy did.

Q Were you ever involved in receiving payment for any of the tapes?

A For like, delivering them and picking them up?

Q Right.

A No. None whatsoever.

• • •

(p 84) Q So the F.B.I. came and interviewed you?

A That's correct.

Q Where did this interview occur?

A At Magic Rent to-Own.

• • •

(p 85) Q After you arranged for the two sales that you spoke of earlier, one for 4,000 tapes to Curtis Mathis and another for 500 tapes, did you arrange any other sales?

A Yes, I did.

Q Do you remember who those were to?

A I think—I can't recall the exact order that I sold the tapes in, but I arranged for them to go to—I believe it was Movieland and Curtis Mathis, and there was one other video place.

And after I made arrangements with—I think Movieland was the last one I made—I had been contacted by the F.B.I. So, I wasn't interested in getting paid anymore for that. That was the last one.

Q Did you have any further discussions with Guy Huddleston, concerning the sales of any other types of tapes?

A Recorded movies, just regular movies.

Q When, if you can recall, did this conversation occur?

A I believe it was in April of '85. I can't recall the exact date.

Q What types of movies were these?

A Movies like you would rent in a regular video place, like "Star Trek, Buckaroo Bonanza", just regular V.H.S. movies like that.

(p 86) Q These were different from the blank tapes?

A Right.

Q Did he state what he wanted you to do, with respect to the movies?

A He wanted to get rid of the movies in one or two sales, if possible. And we were going to sell them at, if I recall correctly, $15 apiece.

Q Do you know how much they ordinarily retail for?

A Approximately $80. Anywhere from like, maybe 49 to 80.

Q Does it differ or vary, depending on the movie?

A Yes.

Q Did he ever give you a list of the movies that he wanted you to assist him with?

A Yes, he did.

Q Miss Curry, I'm now going to show you what has been marked as Government Exhibit Number 4.

• • •

A This is a list of tapes that Guy gave to me that he had and he put down how many tapes he had.

Q How many tapes did he tell you he had?

A What he wrote down was 9,000 to 105,000, at $15 each and—

(p 87) Q He wrote on the list?

A That's what he wrote on the list and—

Q That was written in your presence?

A Right. He wrote that in my presence and it stated how much he would bring in from that, which is $135,000 to $157,000.

Q And this list was also given to you by Guy Huddleston?

A That's correct.

Q Upon receiving that list, what did you do with it?

A When contacted again by the F.B.I., when they came in, I released this to them.

• • •

Q (By Ms. Golden) Did Guy Huddleston tell you where he got those movie tapes from?

A These? The list that I have here?

Q That's correct.

A Right now, I can't recall right off. He did tell me, but I can't remember what it was.

• • •

(p 92) (By Mr. Logan for Petitioner) And there came a time in which Guy talked with you about assisting him in selling some tapes?

A That's correct.

Q And Guy told you those tapes, to the best of his knowledge, were not stolen?

A That's true.

Q Looked you in the eye; right?

A That's true.

Q And you even double-checked with the police officer and that officer also told you—point blank, told you those tapes were not stolen, based on his information.

A That's correct.

Q And did you, at any time, tell Guy that?

A. No, I did not.

Q And you continued to work on selling these tapes?

A That's correct.

Q Under the impression that the tapes were not stolen?

A That's correct.

Q You have no knowledge if Guy knew the tapes were stolen or not; do you?

A That's true.

Q He didn't tell you to be real careful and sell them (p 93) under the table or anything like that; did he?

A No, he didn't. That's why I went down the yellow pages.

• • •

Q He brought some tapes there and showed you the tapes?

A That's correct.

Q And left several tapes there with you?

A He left a box with me.

(p 94) Q And, apparently, you gave one to a police officer.

A That's correct.

Q And basically felt that this was an above-board transaction.

A That's correct.

Q And, in no way, did Guy indicate that this was an illegal transaction or illicit transaction whatsoever; did he?

A. No, he didn't.

• • •

Q Okay. Did there ever come a time that you were talking with Guy and he mentioned that he was getting the tapes from a friend of his, who was getting them in Chicago, a Leroy somebody?

A That's correct.

Q So that Guy, to the best of your knowledge, was selling the tapes for Leroy?

A I really can't state that. He may have purchased them from Leroy to sell for himself, but I don't know. I can't state. I do not know.

Q But he indicated that Leroy was the one who was (p 95) delivering the tapes to him?

A I can't state that he said Leroy was delivering them. I know Leroy was from whom he was receiving the tapes or who was getting the tapes from a manufacturer out of Chicago.

• • •

(p 98) Q With reference to movie tapes, Guy never told you he actually had any movie tapes; did he? Did he ever show you any movie tapes?

A No, he did not.

(p 99) Q You were just talking about that list?

A Yes.

Q And you indicate that whatever movie tapes he was going to be buying to sell, he'd be getting from Leroy, who was going to get them from Chicago?

A That's correct.

(p 164) TRANSCRIPT OF PORTIONS OF PAUL TONEY'S TESTIMONY

October 18, 1985

(By AUSA Golden)

Q Did you, sometime in February, meet Mr. Huddleston in a place called the Zodiac Bar, in Benton Harbor?

A Yes, I did.

Q Can you tell us what happened?

A I believe he was outside at the time that I came in and after which he came in, he had a box. And in that box it contained a T.V. And I guess the conversation was moving around the place that—about the T.V.'s and that's when I inquired.

I asked him about them. He said that they were T.V.'s that were more or less from a group of people who had purchased a truckload, in terms of they had purchased them for the purpose of distributing them around the campus up here.

And what had happened was that they had an overflow and what they were doing were that they were, you know, more or less trying to get rid of the ones that they had left over. And I think I more or less inquired about—in terms of what kind of group was he involved in, you know.

And he stated that they were a group of—my (p 165) interpretation was a group of minorities who had pooled their money together and made the initial investment and they were avoiding the middle person by going and buying directly from the factory.

And their attitude was that they were going to expand and do some more things, which opened my eyes up and which I was very interested in, in dealing with myself.

Q And was this T.V. that he brought in to the Zodiac Bar, one of the T.V.'s in the truckload that they were trying to sell?

A To my knowledge, yes.

Q And what kind of a T.V. was it?

A Twelve inch black and white. I cannot recall exactly the brand name, but it was a 12". It was brand new.

Q And did Mr. Huddleston say how many of these T.V.'s he or his group had to sell?

A Somehow or another, I got the impression and I could be wrong on the fact being that they were about 3,000, you know. But I think upon it later there might have been something like seven or eight hundred.

I don't know. Somehow it stands in my mind about the 3,000, but I really don't remember exactly how that came about.

But, through that, I inquired or requested (p 166) that he let me have some of the T.V.'s and maybe I could use them as an incentive for people to come into the record shop.

We agreed and he stated that that shouldn't—that there wouldn't be any problem. And from that point, a week passed or a couple weeks passed and then I got in contact with him again and he was having a problem, you know, making delivery because he didn't have any trans-

portation to get them down there and his car wasn't large enough.

So, after talking with a friend of mine, who owns a van, and after talking to another friend of mine who was in the process—at the present time getting ready to process a loan for us. He was doing some paperwork on it—he suggested why didn't we just drive up and pick them up one evening and give a check.

Because what I had done was, I had put a sign in my record shop stating that "Black and white T.V.'s, one time deal, coming soon" and there were customers constantly asking about them. And so—

Q What was the price that Mr. Huddleston offered to sell these T.V.'s for?

I believe they were talking about something like $33 a T.V., but if you purchased ten or more, they would be $28.

(p 167) Q And did you later see Mr. Huddleston about purchasing these T.V.s?

A Yes. I called him and he agreed to—he said for us to meet him at his house and he would take us to the store and he would introduce us to the people who were running the store.

Q Did you go to this house?

A Yes, I did.

Q And do you recall about when that was?

A It was winter time. There was snow on the ground. It evidently must have been around the—about

the 7th of March. I believe that's what the bill of sale—the evening of that same date on that bill of sale was the evening that I went there.

Q And where was his house?

A In Ann Arbor.

Q And once you got to his house, what, if anything, did he do?

A Well, he—his wife was there and it was my first time meeting her, along with Mr. Wheeler. Doctor Wheeler was with me.

And we was just talking and—as a matter of fact, there was a T.V. there and I was quite impressed with the way it played because—or showed, should I say, because it was hooked up to a cable. It was hooked up to cable.

(p 168) And we talked—we discussed that and he later came in, after which that's when we followed him to the store.

Q What did you see at the store?

A First I—was I found signs in the windows saying "Black and white T.V.s, $49.95" along with, after going into the store, I recall seeing refrigerators.

And I guess through our discussion at one point or another, we were talking about the store and what his purpose was and that was to rent these same appliances, T.V.s, I guess V.C.R.s and things of that nature and I don't recall seeing any stoves. There might have been some there, but my first impression was a stock of T.V.s. That's what my main purpose was—

Q You did see T.V.s—

A Yes, I did.

Q —in that store.

A Yes, I did.

Q Can you describe what the T.V.s—how they were arranged, what they looked like, how many there were?

A There was a possibility of about 150. And the wall in the back of the store was about like the wall in the back of the courtroom there and there were T.V.s stacked to the top of the wall.

In the middle of the store—

(p 169) Q From the floor to the ceiling?

A Yes. In the middle of the floor there was a pyramid of T.V.s, one sitting on top of the box, out, and on display.

Q Did you, on that evening, purchase some T.V.s?

A Yes, I did.

Q Do you recall how many?

A Twenty.

Q And what was the price you paid?

A $28 per T.V.

Q And was that the end of that transaction?

• • •

They must have been sold within two days, three days. But then I contacted the young lady who (p 170) was running the store again, without the assistance of Mr. Huddleston because that was the initial introduction and I requested to come back and maybe pick up fifty.

They said they didn't think they had that many left because they had sold down to—I think they wanted to hold on to a hundred T.V.s for some type of a weekend show.

Q Did you go back to the store a second time?

A Yes, I did. I went back, I think—

Q Did you purchase T.V.s?

A Yes, I did. I purchased eighteen and that's all I was allowed to purchase.

Q What was the price?

A Same price. I believe the same price.

Q $28, the same?

A Yes, I believe so.

Q Did Mr. Huddleston ever speak to you about video cassettes?

A Yes, he did. I think I tried to contact him again about two days later and he stated that they would—were going to get together and they were possibly going to purchase T.V.s at a later date.

If I recall correctly, then something came up about that they would need to—they had just (p 171) purchased a truckload of videos and did I have any use for them. I told them, "No."

He said, "Well, in order for us to be able to purchase —our purchasing power to purchase more T.V.s, we would have to sell the tapes that we had purchased."

Q Were these video cassette tapes?

A Yes.

Q Were they blanks?

A Yes, they were blank.

I told him I didn't have any need for them, but I would do whatever I could to help out. So he asked me could I—

Q Did you try to help him out?

A Yes, I did. I tried by contacting some of the distributors that I purchase records from and they were very interested.

And as a matter of fact, I contacted Barney's One-Stop in Chicago, when I purchased records from them and he wanted three hundred.

And I contacted Fletcher's One-Stop on 75th Street, I believe it is. They wanted a thousand. So, I got back in contact with him to let him know that they were interested in the tapes.

Q Where is Fletcher's?

(p 172) A In Chicago. I'm not—I don't do a lot of dealing with him, but I think it's on the 75th or 76th Street.

Q And Fletcher's and Barney's are distributors—

A Yes.

Q —from whom you purchase—

A Records.

Q —records for your record shop.

A Yes.

Q Did Mr. Huddleston tell you what price to ask for?

A I believe it was either 2.25 or either it was either 2.75. I really don't recall exactly the exact figure. because—

Q $2.75 a tape.

A Yes. Yes.

Q Did anything become of these proposals to sell T.V.s and video cassettes?

A I got back in contact with him and told him that they would—you know, what they said.

He said at a later date, he would just drop them off. I think it might have been on a Tuesday or a Monday of that following week, but the transaction never took place. He never did get down.

• • •

(p 177) (By Mr. Logan for Petitioner)

Q And there was no—did you ever buy any tapes, by the way, from Guy Huddleston?

A No.

Q Did you ever sell any tapes for him or make arrangements for him for somebody to buy any tapes—

A I—

Q —and that the transaction was completed.

A Not to my knowledge.

Q And with reference to some black and white T.V.s, Mr. Huddleston gave you some information concerning some T.V.s?

A Yes, he did.

Q And you never bought any T.V.s from Mr. Huddleston, though.

A No, I didn't.

Q He only gave you some information, you then contacted Magic Rent-To-Own, I guess it was.

A Yes.

Q And ultimately came up and purchased some T.V.s.

(p 178) A Yes.

Q And Mr. Huddleston—you came to Mr. Huddleston's house and he showed you where the place was.

A Right.

Q And then you ultimately came back to purchase some more.

A Yes, I did.

Q And each of those purchases were at what location?

A At the store. Rent-To-Own or Rent-To-Buy. I'm not really sure of the exact name.

Q Who did you pay any money to?

A I wrote a personal check, should I say a business check, to that company?

Q Magic Rent-To-Own?

A Yes.

Q Did you get a receipt?

A Yes, I did.

Q Do you have those receipts?

A They're there, yes.

Q I hand you two white sheets of paper. Are those the receipts?

A Yes, they are.

• • •

(p 179) A This is the second purchase. Okay. The date of this one was 3-12-85. Name: East Main Records, at 1069 East Main, Benton Harbor, 12" black and white T.V.s, at $28 each. Total of eighteen, for a total amount of $504.

Q And what's on the other one?

• • •

A 3-7-85, East Main Records, 1069 East Main, Benton Harbor, Michigan, twenty black and white T.V.s, 12". Okay, there's ten at $280, plus two, which came to $560.

TRANSCRIPT OF PORTIONS OF FBI AGENT ROBERT NELSON'S TESTIMONY

October 18, 1985

(By AUSA Golden)

(p 185) Q Did you have occasion to know an individual named Guy Rufus Huddleston?

A Yes.

Q How did you come to know him?

A He entered Highland Appliance Store. I approached him at the door and suggested that we go to lunch.

Q Could you tell the members of the jury, where this Highland Appliance was located and on what day this meeting occurred?

A It's located on Eureka Road, in Southgate, Michigan.

I don't know exactly the date. You may have that.

Q Could you tell us approximately what month it was?

(p 186) Q Was it this year?

A It was this year.

Q Do you know the month?

A I think it was May or June.

Q You stated that you met him at the door and introduced yourself to him.

A I introduced myself to him as a buyer for Highland Appliance.

Q Did you know who he was when you went to make the introduction?

A He called me prior to going to Highland Appliance and gave me a description of himself and the approximate time he would arrive.

Q So what was his purpose for calling you?

A To arrange a purchase of V.H.S. movie tapes.

Q At this meeting, did you have a conversation there at Highland Appliance?

A No, I did not. When he entered Highland Appliance, I suggested that we have lunch at Bob Evans Restaurant, that was down the street from Highland Appliance.

After we ordered lunch, I introduced myself to him again as a buyer for Highland Appliance.

He stated that he was a private contractor. Then he stated that he had approximately 100,000 V.H.S. movie tapes for sale. The purchase price to me would (p 187) be $157,000.

Q These are blank tapes?

A These are regular tapes. He showed me a listing of tapes that he had, the most recent being and that caught my eye was the Terminator. That was a new release and that he had that release.

Q So, you're saying the tapes weren't blank. They had movies on them?

A Well, he showed me a listing of the movies that I would purchase.

Q So, these are movie tapes that you are talking about purchasing.

A Right. Yes.

Q And he offered you 100,000 movie tapes—

A For $157,000.

Q So, what's that, $1.57 a tape?

A Apiece. And they were retailed for about $79, $89 retail.

He also stated in the same conversation, that he also had a shipment of 800 Zenith T.V. sets, 19" color T.V. sets that he would also deliver along with this shipment. The price to me would be $200 apiece.

(p 188) Q After discussing the tapes and the television sets, did you offer to purchase them from Huddleston?

A I agreed upon the price of $157,000 and $200 apiece for the T.V. sets.

Q What was thel quantity of television sets again?

A Eight hundred Zenith 19" color T.V. sets.

Q Did you have any discussions about whether Mr. Huddleston had an invoice or bill of lading for either of these items?

A I asked Mr. Huddleston did he have an invoice for the merchandise and he stated no, he did not. That that was no problem, that he would make an invoice out

to say whatever he wanted the invoice to say and that invoice would be good throughout the world.

Q So, he did not receive an invoice with the merchandise, as he explained it to you, but he could make one.

A Yes.

Q Did you have any discussions about whether the tapes were stolen?

A I asked Mr. Huddleston were they stolen and Mr. Huddleston, in his words, stated that, "Some were hot and some were not".

Q What did you construe the use of the term "hot" to mean?

(p 189) A Stolen.

Q Did you in fact arrange for the purchase and the delivery of the 100,000 V.H.S. tapes?

A He said delivery would be made within five days.

There would actually be two deliveries, the 800 T.V. sets along with the 100,000 V.H.S. movie tapes and that would take approximately five days for delivery.

I think these items were coming out of Chicago, Illinois.

He also stated that he had a shipment that he could get to me within two hours. The shipment was located—or the merchandise was located in Saint Joe, Michigan and that I could have that shipment within two hours.

Q Was this shipment also a shipment of V.H.S. tapes?

A This shipment—he showed me a brochure of what he had.

I think it was twenty-eight Amana refrigerators, four of which were side-by-side, two ranges and forty icemakers.

We haggled on the price of that. He started off at $10,000 and I think I got him down to 8.

Q So you—and I guess prior to the actual sale of the tapes, you were going to arrange a sale of refrigerators, (p 190) icemake [sic] and ranges?

A He suggested that I purchase that in lieu of the five day shipment of the other merchandise.

Q Had you, prior to his initiation of that shipment, asked him about the purchase of any refrigerators?

A Would you repeat that again?

Q Prior to him offering these items for sale, had you asked him about the purchase of refrigerators?

A No, I did not.

Q Did you have any desire initially to purchase refrigerators or icemakers?

A My only meeting with him was really to discuss the V.H.S. movie tapes.

Q When he suggested that you purchase the refrigerators in the intermim [sic] period, what was your response?

A At first, I was not interested. I told him that I would have to make a telephone call, that I didn't think that we would—that I would purchase those refrigerators.

Q And did you later contact him?

A The following day, I gave Mr. Huddleston a call and stated to him that I was interested now in the delivery of the refrigerators and that—we then arranged a meeting place for the delivery.

Q Why did you agree to purchase the refrigerators?

(p 191) A Because we received a teletype that morning in our F.B.I. office in Detroit, that twenty-eight refrigerators, two ranges and forty icemakers were stolen.

Q In light of that information, you decided to go through with the purchase.

A Yes.

Q When you contacted him on the second occasion, what arrangements were made for the purchase?

A I gave Mr. Huddleston a call, I guess around 11:30 A.M., and advised him that I was interested now in that shipment that we discussed.

We made arrangements for the delivery to take place at a Bekins warehouse lot, located on Carpenter Road, in Ann Arbor, at approximately two o'clock.

Q Did you arrive at the Bekin Truck Rental?

A I was there about an hour before time and Mr. Huddleston arrived on time.

He arrived in a maroon Cadillac Cimarron, along with another black male.

Mr. Huddleston was driving at the time. He got out of his vehicle. He approached me. I got out of my vehicle and we both talked a little bit in a light.

Mr. Huddleston turned around to the black male (p. 192) passenger and advised him to make the call and have the truck come to our area.

Q So, at the time he arrived there, there was no truck containing the refrigerators.

A Not at that ponit.

Q Did the other gentleman leave?

A He left.

Q Were the trucks or the refrigerators ever delivered to that location?

A They weren't delivered at that particular location, but we recovered the load approximately a block and a half from that location.

Q While you were waiting for the delivery of those refrigerators, did anything occur?

A Mr. Huddleston was arrested.

Q You stated that you recovered the refrigerators about a block and a half away.

A Yes.

Q And did the contents of the trailer at that time—

A It contained exactly what Mr. Huddleston stated it would contain.

Q With respect to the movie tapes that you've testified about previously, did Mr. Huddleston ever indicate to you that he'd received these tapes directly from the manufacturer in Chicago?

(p 193) A No, he did not.

Q Did he ever state that he'd received the tapes from a friend, via Greyhound bus from Benton Harbor?

A No, he did not.

Q Where did he say he received the tapes?

A Off the docks in Chicago.

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(By Mr. Logan for Petitioner)

(p 196) Q Sir, would you look at page ten of the transcript?

A Yes.

Q Is there a question on that page as to if these particular items are hot?

A Mr. Huddleston stated, from this transcript, that they were not hot.

Q That those items were not hot.

A That's right.

Q That's what he told you?

(p 197) A That's what he—well,—

Q Is that what he told you?

A That's not all that he told me.

• • •

(p 198) Q And the answer to that question was, "These goods were not hot."

A He stated, "These goods were not hot."

• • •

(By AUSA Golden)

(p 204) Q With respect to the stolen nature or whether the tapes were hot, could you refer, please, to page thirty-nine and indicate what Mr. Huddleston's statements were as to the nature of the tapes?

A I stated that—Mr. Huddleston stated that—well, I asked Mr. Huddleston were some hot, were most of them (p 205) hot? And Mr. Huddleston said, "No, most of it is not hot."

TRANSCRIPT OF PORTIONS OF PETITIONER GUY HUDDLESTON'S TESTIMONY

October 18, 1985

(By Mr. Logan for Petitioner)

(p 235) Q Do you have any familiarity with T-120 Memorex tapes?

A Yes, I do.

Q What is your familiarity with those kinds of tapes?

A I was contacted in the early part of April, by a person from Benton Harbor, Michigan, Mr. Leroy Wesby, and he indicated to me that he had some T-120 Memorex tapes for sale and asked me if I would assist him in selling those tapes.

Q Did he tell you how many he had?

A Not at the time, no.

(p 236) Q Approximately when were you contacted, as best you can recall?

A April 16th, 17th. Somewhere around there.

Q Had you known Mr. Wesby prior to this?

A I had knew of Mr. Wesby. But I had met Mr. Wesby back in November, through a person that I used to work for, H & H Construction Company and Mr. Ellis Hall, who I did my construction training under, and I had met Mr. Wesby at Mr. Hall's home.

Q I see. Had you met Mr. Wesby anytime after that, or was that the only time?

A Yes, I had worked as a representative for Magic Rent-To-Own and selling Magic Rent-To-Own a—770 12" black and white T.V.s that was delivered in Grand Rapids,

Michigan for Magic Rent-To-Own and Mr. Alphonse Lewis, Junior.

Q How was that, in the contact with Mr. Wesby?

A Mr. Wesby and another gentleman, delivered a truckload of 12" T.V.'s to Mr. Alphonse Lewis, Junior, in the city of Grand Rapids.

We interviewed them for a day and a half and Mr. Alphonse Lewis, therefore, called someone on the phone, talked to the seller of the material. They said the material was not stolen.

We received a bill of sales from Mr. Wesby (p. 237) at that time and Mr. Lewis took the T.V.s and I took my commission and that was that.

Q When you say you interviewed Mr. Wesby, what does that mean?

A I mean Mr. Alphonse Lewis is an attorney at law. So, therefore, he wanted to make sure that he was buying stuff that was not stolen.

So, him and his investigator did interview Mr. Lewis for—I mean Mr. Wesby, for approximately five hours and we put him up in a hotel and then we interviewed him the next morning and made several phone calls to the Benton Harbor area and they assured us that the stuff was not stolen.

Q Have you had any other contact with Mr. Wesby after that?

A Not prior to the Memorex T-120, had I got involved in any other transactions for Mr. Wesby.

Q How did you first know about these Memorex?

A He called me on the phone and said he had some Memorex T-1,000 tapes. And what I told him was, to put

me two cases on the Greyhound bus station, on the Greyhound bus, in care of me, here in Ann Arbor, Michigan.

Q Did you ask him if those tapes were okay, when you talked to him?

A Yes, I did.

(p 238) Q Did he inform you—what did he inform you?

A He informed me that the stuff wasn't—the tapes was not stolen.

Q How many cases are two cases?

A Two cases is twelve to a box. No, two cases is like, twenty-four tapes.

Q Did they come to Ann Arbor, Michigan?

A Yes, they did.

Q By Greyhound?

A Yes, they did.

Q Did you pick them up?

A Yes, I did.

Q What did you do with them after you picked them up, sir?

A Eric Osborne and myself picked the tapes up at the Greyhound bus station, in Ann Arbor, Michigan.

We took the tapes to Magic Rent-To-Own. I asked Karen Curry if she would assist me in selling the tapes.

Q What did she say?

A She said yes.

Q Did she ask you if the tapes were stolen or not?

A Yes.

Q What did you tell her?

A I told her that the tapes was not stolen.

(p 239) Q What did she do in terms of assisting you in selling the tapes?

A Well, I told her—she had opportunities in the Magic Rent-To-Own business, to deal with other video stores and stuff like that. So, I told her to call whoever, and see if they was interested in buying some tapes.

Q Did you and Karen work out an arrangement, with reference to her receiving compensation for making these phone calls and making these contacts?

A Yes.

Q What was that arrangement?

A Her compensation was going to be $.25 per tape.

Q How much was she to sell the tapes for?

A Between 2.75 and $3 an hour.

Q And hour?

A I mean $2.25 to $3 per tape.

Q 2.25?

A 2.75 to $3 per tape.

Q Did she do that?

A Yes.

Q Do you have any personal knowledge of Karen, double checking to confirm that these particular tapes were in fact, not stolen?

A Yes.

(p 240) Q How do you know that?

A Eric Osborne told me. Eric Osborne was working for me, during the day, in the construction and installation business and he was working for Magic Rent-To-Own at night, in delivering their appliances that they rented out during the day. So, he was assisting Magic Rent-To-Own in the delivery of materials that they leased—rented out daily.

Q How did he know that Karen had checked to find out the tapes were not stolen?

MS. GOLDEN: Objection, your Honor. Hearsay.

THE COURT: Sustained.

Q (By Mr. Logan) Do you know Officer Chan?

A Yes, I do.

Q Do you know if Officer Chan told Karen these tapes were not stolen?

MS. GOLDEN: Objection, your Honor. Same objection.

THE COURT: Sustained.

Q (By Mr. Logan) Did you have a card or any cards of your own—business cards?

A Yes, I did.

Q Did you have any business cards of Magic Ren-To-Own?

A Yes.

Q Did Karen ever make any transactions?

(p 241) A No.

Q With reference to the tapes.

When I say transcations, did she find any buyers?

A Yes, yes.

Q And who did she obtain, or do you know?

A The first buyer was Curtis Mathison (sic) in Lansing, Michigan. She contacted a Curtis Mathison (sic) on Washtenaw, here in Ann Arbor-Ypsi. He contacted a Curtis Mathison (sic) in Lansing. I got a phone call from Karen that said Curtis Mathison (sic), in Lansing, will take 4,000 tapes.

But, the Curtis Mathison (sic) in Ypsilanti, was the person that was selling the tapes.

I—

Q Do you know who that person was? What is his name?

A I think, Mr. Cole.

Q Okay. And what happened after that?

A Well, I called back to Benton Harbor and talked to Mr. Leroy Wesby and indicated to him that I had a buyer for 4,000 tapes.

Q What happened then?

A At that time, Mr. Wesby was not in Benton Harbor, so I discussed it—the matter with his wife. She contacted him where he was at, trucking and he called (p 242) me back, at night, and told me what to do to solify (sic) the deal.

Q What was that?

A It was to meet his wife and two peoples he had driving the truck, in Lansing, and drop the tapes off and get the money and give the money to his wife and the deal would be closed. And take my commission.

Q What was your commission?

A My commission was about 25% or less. About 20%, as I remember.

Q Was there a prior meeting with Mr. Cole, before meeting Mr. Cole in Lansing?

A Yes. We met in front of the Washtenaw Curtis Mathison (sic) store, here on Washtenaw Avenue.

Q What took place at that particular meeting?

A I met Mr. Cole. We talked. We discussed the material that he was—I was selling to him and we proceeded on to make the initial contact.

At that first meeting, he wanted to take the merchandise to Flint, Michigan.

I consulted Mr. Wesby, at that time. And what had happened was, Flint is an awfully long ways from Benton Harbor. So, he wanted to get somewhere closer because he wasn't available to make the delivery himself.

(p 243) Q So, that particular agreement never was consummated at that time?

A Yes.

Q How was any other contact made with Mr. Cole?

A At that time, Mr. Cole recontacted Karen or Karen recontacted Mr. Cole. I don't know how that happened. But then they contacted me again and said—made some arrangements to meet us at the store, in Lansing.

Q Now, at this time, do you have any knowledge that these tapes were stolen?

A I had no knowledge that the tapes was ever stolen, whatsoever.

• • •

Q Did you believe that the tapes were stolen?

(p 244) A No.

Q Did you then meet Mr. Cole in Lansing?

A Yes, I did.

Q How many people did you meet in Lansing, when you met Mr. Cole?

A Just Mr. Cole.

Q Did you meet a Mr. Peters?

A Yes, but not in the original first meeting in Lansing.

Q Where did you meet Mr. Cole?

A I met Mr. Cole in front of the Leonard Mall, in Lansing, on the corner of Saginaw and Waverly.

Q Why did you meet him there?

A Because that's where he said meet him at.

Q About what time of the day or evening or night was this?

A Probably approximately 11:30 A.M., in the morning.

Q Approximately 11:30 A.M., in the morning?

A Yes.

Q Do you know if it was the weekend or a weekday?

A It was a weekday.

Q Do you recall what day it was?

A Probably Thursday.

Q What happened after you met Mr. Cole?

A I met Mr. Cole and told Mr. Cole that the truck was going to meet me at I-69 and 96 at a truck stop there (p 245) in Lansing and then I would—the truck would follow me over to the Curtis Mathison (sic) store, which was right across the street.

One reason Mr. Cole met me at the mall was to show me where the Curtis Mathison (sic) store was.

Q Did that happen?

A Yes, it did.

Q Who was with the truck?

A Mrs. Diane Wesby and her daughter and three other peoples was driving a U-haul truck.

Q What did you do with the truck once it arrived?

A Once the truck arrived, we took it to Curtis Mathison, (sic) backed the truck up. Mr. Peterson (sic) gave

Mr. Cole a check for $12,000 that he took to the bank, cashed, and gave me $10,000. I then gave Mrs. Wesby $8,100, that she took back to Benton Harbor.

Q Was there a receipt that was made out or an invoice made out to Mr. Peters?

A Yes. I made a receipt out to Mr. Peterson (sic) for $12,000.

Q Did you sign your name?

A Yes, I did.

Q What type of car were you driving? Were you driving your car or another vehicle?

A I was driving my car, which is a 1984 Cimarron.

(p 246) Q What happened after you tendered $8,100 to Mrs. Wesby?

A She proceeded back to Benton Harbor.

Q What did you do?

A Well, there was a balance of 2,500 tapes left on the truck. There was approximately 6,500 tapes that was delivered that day.

I took the 2,500, put them on a small U-haul, and brought them back to Ann Arbor.

Q Did you then involve yourself in any other transactions after that?

A Yes, I did.

Q What other transactions?

A I sold 500 to Nowshowing Video.

Q Sold 500 to Nowshowing Video?

A Yes.

Q Who did you sell tapes to at Nowshowing Video? Who did you sell tapes to?

A I can't recall the person's name that I sold the tape, but I know it was Nowshowing Video.

Q How do you know that?

A Because of the evidence and the stuff that has been shown earlier. But I can't remember any names.

Q Okay. And how many tapes?

A Five hundred.

Q How much did you sell them for?

(p 247) A $3 each.

Q Who made that particular contact?

A Karen Curry.

Q How did she make that contact?

A Through the yellow pages, through the telephone.

Q Did you tell her, only call certain people?

A No. I was assured that the tapes was not stolen and we could sell them to whosoever wanted to buy them.

Q What would you have done if you had known the tapes were stolen?

A If I had known the tapes were stolen, I would have never involved myself and my family in the situation.

Q You were selling the tapes for $3?

A No.

Q Did you ever become involved in a transaction pertaining to Amana refrigerators?

A Yes.

Q What happened?

A I was also called by Mr. Wesby and he said he had picked up some Amana refrigerators and a truck, in Chicago—he picked up some Amana refrigerators. And he said they was available for sale and see if I could handle some similar arrangement, like we did on the tapes.

(p 249) Q Did he tell you where he got them?

A Not per se.

Q Did you ask him where he got them?

A Yes, I did—I always ask persons if the merchandice is stolen.

Q What did he say?

A He said no.

Q On the tapes, did you ask Mr. Wesby where he got the tapes?

A Yes.

Q Where did he tell you?

A He said he got them from a warehouse down in Texas.

Q A warehouse in Texas?

A Yes.

Q Did you have any reason to disbelieve him?

A Yes.

Q Why $3? Did you think that was low, high?

A Well, from my discussion with Mr. Cole and from my discussion with Mr. Peterson (sic), when we delivered the first load of tapes, he had indicated to me that he felt that $3 was about what his market would be if he had to buy them from somewhere else.

He had told me that he paid—the maximum he paid for a tape was like 3.89 and would range between 3.89 and 3.25, on the low side.

Q What did you sell the tapes again for, to Movie—

A Movlieland. Another contact. I sold those tapes also (p 248) for $3 per tape.

Q Where else did you sell tapes?

A I sold 1,500 tapes to Aspen Record Company, in Detroit, Michigan.

Q How much did you sell those tapes for?

A 2.75.

Q Where else did you sell any tapes to?

A Those are all the tapes that I sold.

Q At any time, when you sold those tapes, did you tell anybody that these tapes were stolen?

A No.

Q Did you know these tapes were stolen?

A No.

Q Did you have any knowledge the tapes were stolen?

A No.

Q What did you do with reference to the refrigerators?

A Well, then I gave the information to Karen because she was the sales rep and she proceeded to call, through the yellow pages, and try to find buyers for refrigerators.

Q Did you tell Karen to be careful, you think these things are hot?

A No.

Q Did you have any knowledge that these refrigerators (p 250) were hot.

A No.

Q Stolen?

A No.

Q What happened after you asked Karen to make some phone calls?

A Karen made a phone call and indicated to me that she had contacted a person at Highland Appliance, in Southgate, and I was supposed to meet them there at 10:30 the next morning.

Q Do you see that person in the courtroom?

A Yes.

Q Who is that person?

A The gentleman sitting over there, with the red tie and the blue shirt and the blue coat.

Q Did you meet him at Highland Appliance on that day?

A Yes, I did.

Q Did you talk with him?

A Yes, I did.

Q Where did you meet him at and about what time?

A Oh, it was about 10:30. I walked in the store, he was walking through the store. I asked for the manager. I walked over, he introduced himself. We talked for a few minutes and then he said, "Let's go to breakfast" and we journeyed to Bob Evans.

(p 251) Q You went to Bob Evans?

A Yes.

Q Now, you've heard testimony, by Mr. Nelson, with reference to conversations that was held at Bob Evans?

A Yes.

Q I assume you and him had certain conversations at Bob Evans?

A Yes.

Q What did you talk about?

A We talked about—I had went to Benton Harbor a couple days prior to meeting with Mr. — the officer at Bob Evans.

When I was in Benton Harbor, Eric Osborne and myself visited Mr. Wesby's home and he gave us a list with some V.C.R. movie tapes on. And he had said that this material would be available, forthcoming.

Q What did that mean?

A That means that he was in a position—or looking at getting in a position to purchase some V.C.R. movies. That's what I thought it meant.

Q Did you convey that information to Mr. Nelson?

A I conveyed that information to Karen and Karen probably is the one that conveyed that information to Mr. Nelson.

Q Do you recall talking with Mr. Nelson, at this breakfast meeting?

(p 252) A Yes.

Q Do you recall talking about V.C.R. movie tapes?

A Yes.

Q Did you tell him how much they would be sold for?

A Yes.

Q What did you tell him?

A I had quoted him the price that Mr. Wesby had quoted me, approximately 15 to $18 per V.C.R. tape.

Q How many tapes were you talking about?

A I think the number was a hundred thousand of them.

Q Did you ever come in possession of any video movie tapes?

A No.

Q Do you know if Mr. Wesby ever came into possession of those?

A I do not know.

Q Did you ever sell any V.C.R. movie tapes?

A No, I did not.

Q What then happened, with reference to the conversation you were having with Mr. Nelson?

A Well, I had indicated to Mr. Nelson that Mr. Wesby had indicated to me, the evening before, that there were twenty-eight or somewhere around twenty-eight Amana refrigerators that he had in Benton Harbor and that he was trying to sell. And that's—and I had (p 253) a brochure in my pocket with a picture of one of the Amana refrigerators on it.

Q And did you show that to Mr. Nelson?

A Yes, I did.

Q Did Mr. Nelson, at any time, ask you if these were stolen or hot?

A Yes, he did.

Q What did you tell him?

A I told him no.

Q Were there any time that you and Mr. Nelson talked about some of them were and some of them weren't?

A No.

Q You don't recall that?

A No.

Q Would you have told him that some goods were hot and some were not?

A No, because I had no knowledge that I was dealing with any material that was hot. Because in my business, you have an automatic instinct to give people an invoice for whatever you do for them, or a receipt.

Q Did you inform him that you would give him a receipt?

A I informed him that I would give him an invoice for whatever I sold him.

Q Now, there was also some testimony that an invoice (p 254) would be given that would be "good around the world".

Do you recall any conversation as to what that meant?

A Well, it was that the only stipulation I had with giving an invoice was, that we wanted a cashier's check or cash and I would make an invoice out for the material that I sold to anyone.

Q Now, when we talk about invoice, what are we talking about?

Is that the bill of lading?

A No. It's an invoice. If I've got ten Memorex tapes and you wants to buy ten Memorex tapes, I put down ten Memorex tapes on the invoice, sign my name and you pay me either in a cashier's check or cash.

Q So then, you're saying an invoice is the same as a receipt?

A Yes.

Q Were you prepared to give a receipt for the merchandise sold?

A Yes.

Q And in fact, have you always given receipts whenever you sold anything?

A Yes.

Q Have you ever told somebody, "No. I can't give you a receipt because this stuff is hot"?

(p 255) A No.

Q That meeting ultimately concluded, I assume with Mr. Nelson?

A Yes.

Q After the conclusion of that meeting, what then took place?

A Well, at the conclusion of that meeting, he had indicated that he did not want to deal with refrigeration. Okay? He wanted a hundred thousand V.C.S. movies. I told him I did not have a hundred thousand V.C.S. movies.

He went his way, I went my way, and the next day, he called and had indicated that he wanted the refrigeration.

Q The refrigerators?

A Yes.

Q And did you have those?

A No, I did not.

Q Where were they?

A I had to contact Mr. Wesby, in Benton Harbor.

Q Did you do that?

A Yes, I did.

Q What was he to do?

A Well, what Mr. Wesby had indicated to me, was to set up a meeting, set up the transaction and proceed.

(p 256) Q At that time, with reference to the refrigerators, did you have any knowledge that the refrigerators were stolen?

A No. Because we had completed two clean transactions, with Mr. Wesby, that I thought was clean.

Q How much were the refrigerators being sold for, sir?

A The refrigeration was being sold for about between 325 and $350 per unit.

Q Did you check to see if that was comparable to the market?

A Yes.

Q Where did you check?

A I checked at a place in Ann Arbor called Big George's, where you can buy refrigerators for 389—between 389 and 450.

Q You testified, you've taken an oath—

A Yes.

Q —to tell the truth.

A Yes.

Q Are you telling this jury the truth, that you did not know these items were stolen?

A Yes. If I had known these items were stolen, I would never even—I would never have gotten involved in the transaction of these tapes.

MR. LOGAN: I have no further questions.

• • •

(By AUSA Golden)

(p 267) Q You were present at this interview, is that correct?

A Yes.

Q At this interview, you asked Mr. Wesby questions?

A Yes.

Q What kinds of questions?

A We asked him if the material was stolen. We also asked him if he could give us some referrals. He gave us some referrals.

Attorney Lewis did call those referrals and he felt comfortable with making that purchase. And I think he paid something like—I don't know the amount that he paid, right offhand, for 770 televisions.

Q Did you ever ask Mr. Wesby where he acquired the televisions?

A Not at that time. I assumed that they came out of Benton Harbor.

Q He never told you that he purchased them from a manufacturer or anything?

A No.

Q But you're trying to find out whether the televisions were stolen?

A Yes. Mr. Lewis was trying to find out and I was trying to find out if the televisions were stolen.

(p 268) Q But you never asked where Wesby obtained them from?

A No. But he did give us some phone numbers and we did call and Mr. Lewis did have a conversation with a gentleman and he felt assured that the television was not stolen and he proceeded to purchase them.

Q What was your role in this meeting? You were just the person who introduced Wesby to Mr. Lewis?

A Yes and I received a finder's fee.

Q You and Mr. Lewis were friends; were you not?

A We are friends, yes.

Q You still are friends?

A Yes.

Q So, the finder's fee that you received, was for making the introduction with Mr. Wesby?

A Yes.

Q You stated earlier, that Wesby called you on the telephone, to tell you about the tapes; is that correct?

A Yes.

Q Where did he call you?

A At my home.

Q So you'd given him your home number?

A Yes. I was working out of my home at that time and on my business card, is my home number.

On my business letterhead, is my home (p 269) mailing address. So, I was working out of my house.

Q Did you ever use the Magic Rent-To-Own as a place to receive calls?

A Yes, I did.

Q When Mr. Wesby called you and told you he had some tapes, did you ask him where he got them?

A Not that I can remember.

Q At that point, you weren't concerned about the tapes being stolen?

A At that—I did ask him if the material was stolen and we always talked about if the material is stolen.

Q But you never asked where he got them from?

A No.

Q Did you ever ask to see a receipt or a bill of sale?

A I always ask if the stuff was safe and if I could proceed in a businesslike manner in selling the materials.

Q When you say, "You asked if it was safe and if you could proceed in a businesslike manner", what do you mean?

A I mean, if I can sell the tapes to any business anywhere in the country and give them a legitimate receipt, I believe the stuff not to be stolen.

Q Have you had occasion to be presented with materials where you couldn't deal in a businesslike manner?

(p 270) A No, no.

Q So that your assumption would be, anything that you come into contact with, you would treat in a business-like manner; is that correct?

A If I received a receipt from the buyer, I would sell it with a receipt.

Q Did you ever receive a receipt for the television sets that you sold, on behalf of Mr. Wesby?

A Mr. Lewis did receive—he prepared a legal bill of sale at his office.

Q When Mr. Wesby contacted you about the tapes, did you ever receive a receipt or did he ever show you a bill of sale, to show proof of ownership?

A I was not actually selling the tapes. I never did have, other than 2,500 tapes, in my possession.

The 4,000 tapes, I never had in my possession. So, I did not need a receipt.

All I did, was go through Karen and make the arrangements for them to meet Mathison (sic) in Lansing. I never had possession of the 4,000 tapes that was sold to Curtis Mathison (sic).

Q But you stated, during your direct testimony, that you made sure that the tapes were not stolen.

A By asking Mr. Wesby.

Q So, you didn't require anything else beyond that, other (p 271) than his word?

A Yes.

Q So you took him, at his word, that the tapes weren't stolen?

A Yes.

Q And you'd only known him a few months; is that correct?

A Yes. And I had met him through a mutual friend.

Q Now, isn't it a fact that when you went to Magic Rent-To-Own, you told Karen Curry that you received these tapes directly from the manufacturer in Chicago?

A That's not true.

Q Isn't it a fact, that you told Karen Curry that you purchased the tapes for a dollar apiece?

A That's not true.

Q Isn't it a fact, that you told Robert Nelson here, that when you were offering those tapes for sale, that you had gotten them from the docks in Chicago?

A That's not true.

Q Do you know why Karen Curry would have any reason to be untruthful about anything that she stated, concerning you?

A Yes.

Q Was she truthful when she stated that you approached her about the tapes?

A Yes, I did. Yes, she did.

• • •

(p 276) Q In the first instance, where you met Mr. Wesby, you had a full interview and you ask questions

and you made phone calls about where those televisions had come from; is that correct?

A The attorney did, yes.

Q Were you not a part of that?

A I was there, yes.

(p 277) Q Did you not ask questions?

A Yes.

Q But you didn't make that same kind of inquiry when you were presented with the tapes; did you?

A No, because we was buying from the same identical person that we had asked all those questions to prior.

Q You didn't make that same inquiry when you were presented with the refrigerators; is that correct?

A No. I did ask him if the stuff was stolen or if we was dealing with stolen merchandise.

Q When you met with Mr. Nelson, isn't it a fact that you offered him 100,000 video movies, for $157,000?

A I had a list with me that had been given—

Q Mr. Huddleston—let me rephrase the question.

A Okay.

Q Isn't it a fact that you offered 100,000 V.H.S. movies to Mr. Nelson, for $157,000?

A No.

Q You've heard Mr. Nelson's testimony; have you not?

A Yes.

Q And you heard him say that he was wearing a central body monitor, a wire?

A Yes.

Q That picked up everything that was said?

A Yes.

(p 278) Q And that there was a transcript made of that conversation?

A Yes.

Q I'd like to show you page twenty-eight of that transcript, sir.

Do you see initials on that page, indicating who was speaking?

A Uh-hmm.

Q Do you see your initials reflected on that page?

A Yes.

Q Towards the lower half of the page, do you not say, "We're talking about 157 grand"?

A If I'm allowed, I can tell you what I said.

Q If you can just answer my questions, Mr. Huddleston.

THE COURT: This is not in evidence, so you're not asking him to read that to the jury.

MS. GOLDEN: No. I'm asking him if his review of the transcript indicated that he—

THE COURT: That's not the way you go at it.

That's not in evidence. You understand that. You may ask him what he said.

Q (By Ms. Golden) Did you tell Mr. Nelson that you would offer the 100,000 movies for $157,000?

A No.

Q Never had any discussions about $157,000?

(p 279) A No. We had unit prices.

Q What is a unit price?

A Fifteen to $18 per tape.

Q So, what was the total purchase price?

A I don't know. I don't have a calculator readily available.

Q You didn't discuss a total purchase price?

A No.

Q You just offered them for sale at $15 a tape?

A Fifteen to $18 per tape.

Q With respect to the refrigerators, did you have a unit price for that, also?

A Yes. Between 325 and 375 per unit.

Q Did you decide on a price?

A The total price was $10,000.

Q It wasn't $8,000?

A No. It was $10,000.

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TRANSCRIPT OF PORTIONS OF ALPHONSE LEWIS, ESQ.'s TESTIMONY

October 18, 1985

(By Mr. Logan for Petitioner)

(p 299) Q Did there ever come a time that you came into possession of some television sets?

A Yes.

Q How many television sets?

A Five hundred, maybe.

Q And did there ever come a time that the person who was selling these television sets, came to you with the offer to sell them?

A Well, the offers to sell had been made generally over the telephone and there was some negotiation going back and forth and someone finally did deliver, yes.

Q Did you, at any time, ever inquire of the person who was trying to sell these televisions, as to where they got them from, if in fact—and the nature of the transaction (p 300) that they had acquired the T.V.s?

A Yes.

Q And how did you do that?

A By questions and requesting documentation.

Q And where was this done at?

A In my office in Grand Rapids.

Q And who was present?

• • •

A Yes, Guy Huddleston was there. There was two fellows there who had—who I'd been told—now, you realize they'd come into my office. I hadn't seen them earlier.

They come into my office saying they had—they had brought the televisions. And there were two of them, as I recall it, and those were the two that I started talking with.

Q Who were they?

A Well, the names, I don't recall at the moment.

Q Was one of them named Leroy Wesby?

A Well, that may be his last name. I think one was named Leroy. Originally, I only recall him giving me first names and later on I did get both names. I just don't (p 301) recall them.

Q Who else was present?

A Well, I had my, I had my—I called my investigator who was not in my office at the time. I called my investigator, who was a recently retired chief of police. I called him down to the office also to help me to do the checking.

Q What's his name?

A His name is Lesley Fisher.

Q And did he come down to your office?

A Yes.

Q And how did you go about checking to find out if in fact these particular items were okay, if you would?

A Well, one of the things I did, of course, is question those fellows who had delivered them. And one of the things—someone had given me a card showing a trucking company on it and one of the things on that card was a fellow that I knew in Benton Harbor. His wife works in—for the courts down in Benton Harbor.

Q Who was that fellow?

A The Reverend Ellis Hall. And somewhere along—I was really busy on this particular day and it was in the afternoon. And so, at one point in time, I sent all of them out of my office with my investigator, to have him talk with them to do whatever checking he (p 302) thought was necessary to be done, to do so.

I also called a friend of mine who's in the unclaimed freight business, but I was not able to talk to him. I didn't get him on that particular day.

Q Did you, at any point in time, form any conclusions as to the nature of these goods? If they were stolen —

A Whether it was stolen or not? I certainly came to that conclusion, because I certainly would not have been involved in it if I even had the slightest hint they were stolen.

Q What led you to the belief they were not stolen?

A Well, a number of things.

Q And tell the jury what those are.

A All right. One of them is that, the one—the fellow named, if his name was Leroy, if that's the one, one of the fellows whose name was on the card with Ellis Hall's name.

I called Ellis Hall because I know him very well. I've known him for years because he was associated with Model Cities program when I headed up the Model Cities program in Grand Rapids.

And I called him and the trucking company that they had had apparently is a partnership. He said, of course, they were no longer operating in that particular trucking company, but at least had indicated that he had (p 303) been in business with this fellow. And also, this fellow was an assistant minister, I believe, at his church.

Q This Leroy was assistant minister—

A Right.

* * *

(p 304) Well, I then of course had a conference with my investigator, after he had talked to them. I also had a conference with Guy privately because I had known Guy for a long time and—

Q Was Guy present when all this was going on?

A Yes. Back and forth, yes.

Q And at a point in time, what was your determination as to these particular goods?

A Oh, one other thing happened is, I was going to pay by check and I—and the time came that you couldn't go to the bank.

And, of course, banks in Grand Rapids and everyplace else anymore, they are very touchy about cashing out-of-town checks for people that they do not know.

So, that I wrote out a check for this and of course, the check could not be cashed and they would have to wait and he had to get—I remember the fellow named Leroy had to call someone.

And that's another thing I did is, I delayed it because I knew if it had been a stolen situation, they would have been rushing out of my office. I assumed, you know, if that was true.

Secondly, another thing, to answer an earlier question, would be that they were talking about a large (p 305) number of televisions and I never could believe that these fellows could be capable of stealing that many televisions.

So obviously, then he called someone to get permission to wait until the next day and I listened to that telephone conversation on my telephone. He was calling from another telephone.

Q How much did you pay for the televisions?

A In the neighborhood of 12, maybe 10, $12,000.

Q And what did you do with the T.V.s?

A Well, I stored them and then I had sales on my—brought them to my store. I sent part of them to my store. They loaded them in Grand Rapids.

Q Your store in Ypsilanti?

A In Ypsilanti, yes.

Q These are black and white T.V.s?

A Yes, these were. Yes.

Q Did you have any other dealings—

A It was just before Christmas, of course and it was too close to Christmas. We had to try to, you know, sell them, you know, without a lot of advertising and so on.

Q Did you have any other dealings with this Leroy?

A No.

Q Based on the checking that you had done, it was your determination that the items that Leroy was selling (p 306) were not stolen.

A And the documentation.

Q What documentation did he present?

A Well, even though I'm a lawyer and have been a lawyer for thirty-nine years, I knew that usually in the trucking business—because some years ago, I used to have a client that was in the trucking business and I knew that generally there was a such thing called a bill of lading.

I also knew that generally if you're going on the road, you have some kind of a logbook. So I asked for those things and he did present to me a so-called bill of lading. And of course, I made him sign a bill of sales for them and I prepared the bill of sales, of course.

Q You signed a bill of sale?

A Yes.

Q Do you have those documents with you today?

A No, I do not. You didn't call me until last night and I tried to run by my office to pick up the green folder that I have that information in, but I was unable to find it within the time frame that you had set out.

PETITIONER'S

BRIEF

No. 87-6

In The
Supreme Court of the United States
October Term, 1987

GUY RUFUS HUDDLESTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. What standard should govern the admissibility of "similar acts" evidence under Fed. R. Evid. 404(b)—must the government prove the misconduct by "clear and convincing" evidence, as is required by the Seventh, Eighth, Ninth, and D.C. Circuit Courts of Appeals; or instead prove the misconduct by a "preponderance of the evidence", as is required by the Second, Fourth, Fifth, and Eleventh (and now the Sixth) Circuits?

2. Which standard of harmless error should apply to the erroneous admission of prior misconduct evidence—the "harmless beyond a reasonable doubt" standard, or the "effect on substantial rights" test?

3. Whether the District Court abused its discretion in admitting evidence of the prior similar acts in question here, the sale of the supposedly stolen television sets, and whether admission of such evidence was harmless?

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The opinion of the court of appeals granting the government's petition for rehearing, vacating the earlier decision, and affirming petitioner's conviction is reported at 811 F.2d 974 (6th Cir. 1987). (Pet. App. C1-C9). The initial opinion of the court of appeals reversing petitioner's conviction is reported at 802 F.2d 874 (6th Cir. 1986). (Pet. App. D1-D16).

—o—

JURISDICTION

The judgment of the district court for the Eastern District of Michigan was entered on November 12, 1985. (Pet. App. E1-E2). The initial judgment of the court of appeals was entered on October 8, 1986, reversing the conviction and remanding the case for a new trial. (Pet. App. D1-D16). After the government filed a petition for rehearing, the court vacated the earlier decision and affirmed petitioner's conviction on February 20, 1987. (Pet. App. C1-C9). Petitioner's motion for rehearing *en banc* was denied on April 30, 1987. (Pet. App. B-1). The petition for a writ of certiorari was filed on June 27, 1987. It was granted by this Court by order entered on October 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

—o—

RULE OF EVIDENCE INVOLVED

Rule 404(b) of the Federal Rules of Evidence provides:

> "*Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, op-

portunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

—o—

STATEMENT OF CASE

Petitioner Guy Huddleston was convicted by a jury in the United States District Court for the Eastern District of Michigan of one count of a two count indictment. (J.A. 3-4). He was convicted of 18 U.S.C. § 659 for possessing 500 stolen blank video tapes on April 23 to 25, 1985.[1] He was acquitted of selling 4,000 different stolen blank VHS tapes on April 19, 1985, an offense under 18 U.S.C. § 2315. (R. 468). The issue at trial as to both counts was whether Mr. Huddleston knew the tapes which he sold and possessed were stolen. The issue was a hotly contested one and the case was close—the jury deliberated for two days before reaching their split verdict. (R. 441-445, 450-460, 467). Mr. Huddleston was sentenced to one year's imprisonment and ordered to make restitution. (Pet. App. E1-E2).

The evidence at trial is summarized in the initial opinion of the court of appeals. (Pet. App. D2-D4). In early April, 1985, the Tandy Bell & Howell plant in Northbrook, Illinois manufactured and sold a number of Memorex T-120 VHS blank cassette tapes to Memtech Products in Arlington Heights, Illinois. (R. 46-48). On April 11, Memtech sold 32,448 of the tapes to the K-Mart Corporation of Michigan for $4.69 per tape. (R. 49-50, 54). Memtech arranged to ship the tapes to K-Mart via an Overnight Express semi-trailer truck. However, the trailer was first sent to the Overnight Express yard in South Holland,

[1]The indictment charged that the possession count (Count Two) occurred on or about April 30, 1987. However, testimony showed the 500 tapes were possessed on April 23 through April 25, 1987. (R. 152-155).

Illinois because K-Mart was not scheduled to take delivery until April 16, 1985. Employees at the yard discovered that the trailer was missing on April 15, and contacted the police on April 16, who in turn, contacted the FBI. (R. 59-62).

Karen Curry, the manager of the Magic Rent-to-Own appliance store in Ypsilanti, testified that sometime shortly thereafter (R. 100), Mr. Huddleston, a local housing contractor, asked her if she would help him sell some blank VHS tapes.[2] (J.A. 12). Ms. Curry could not recall the number of tapes he said he had.[3] (J.A. 12). However, both she and Mr. Huddleston testified they were only involved in selling 6,500 tapes. (J.A. 18; 52). According to Ms. Curry, Mr. Huddleston told her on that day that he got the tapes "directly from the manufacturer" and that he had paid "a dollar a tape, at least." (J.A. 13). Mr. Huddleston denied telling her this (J.A. 67), testifying that he instead had been contacted by Leroy Wesby, an independent long-distance trucker, who told him that he got the tapes legitimately from a warehouse in Texas, and would pay Mr. Huddleston a commission if he would help sell them. (J.A. 43,55). Ms. Curry did admit that Mr. Huddleston later told her he was getting the tapes

[2]Ms. Curry testified that Mr. Huddleston was a friend of Alphonse Lewis, a Michigan attorney, and the owner of the Magic Rent-to-Own discount appliance and rental store. Mr. Huddleston conducted his contracting business out of his home, but would come to Lewis' store once a week to use it as an office. Ms. Curry took messages for Mr. Huddleston, and occasionally helped him with typing. (R. 69-71).

[3]The initial court of appeals decision (Pet. App. D-2), and respondent's answer to the petition for certiorari (Res. 2) recount that Mr. Huddleston told Ms. Curry he had "a truckload" of blank videotapes to sell. Petitioner has been unable to find this testimony anywhere in the trial record. Ms. Curry did say she thought the figure of 20,000 tapes was mentioned by Mr. Huddleston at the initial meeting or at some later time. (J.A. 12).

from a man named Leroy, who was getting them in Chicago. She was unsure whether Mr. Huddleston was buying them from Leroy, or rather selling them for Leroy. (J.A. 22-23).

This was the only point of contention between the testimony of Ms. Curry and Mr. Huddleston. They agree that she asked him whether the tapes were stolen, and that he told her they were not. (J.A. 13). He told her he would pay her to arrange sales to area retailers in no less than 500 tape lots at $2.75 to $3.00 per tape. (J.A. 12-16). Before doing so, she asked an Ypsilanti police officer to determine whether the tapes were stolen. The officer told her the police teletype contained nothing to indicate the tapes were stolen. She continued to check with the officer everyday during the next week, and was told there was no theft report. (J.A. 15-16).

She arranged for Mr. Huddleston to sell 4,000 tapes to Curtis Mathis on April 19; and 500 tapes to Nowshowing Video in Livonia, Michigan, and 500 tapes to Movieland on April 25. (J.A. 14,18). Mr. Huddleston paid her 25 cents per tape for arranging the sales. (R. 81). There was no evidence showing that Mr. Huddleston ever possessed any tapes other than these, except for 1500 which he attested he sold to Aspen Records in Detroit. (J.A. 54). Ms. Curry testified that Mr. Huddleston used his own name in every transaction, and instructed her that he would take care of problems with defects; she therefore told customers that defective tapes could be returned to Magic Rent-to-Own. (J.A. 16-17).

After the last sale, Ms. Curry was contacted by the FBI, and was told the tapes were stolen. She was instructed not to tell Mr. Huddleston, and she did not. Conversely, Mr. Huddleston never indicated in any way to Ms. Curry that he knew the tapes were stolen. (J.A. 21-22).

Ms. Curry stated the only other items Mr. Huddleston talked to her about possibly selling were movies on videotape. He gave her a list sometime in April, and talked about 9,000 movies to be sold at $15 per movie. However, he told her he didn't have the movies in his possession, but would instead be getting them from Leroy. (J.A. 19-20,23).

The only other government witnesses who testified about the blank VHS tapes were Dennis Cole, the manager of Curtis Mathis in Ann Arbor, and Ronald Hall, the manager of Nowshowing Video in Livonia. Their testimony concerning their purchases of tapes from Mr. Huddleston is consistent with that of Mr. Huddleston. Mr. Cole stated that he was contacted by a woman from Magic Rent-to-Own who was selling VHS blank tapes for $2.75 to $3.00 per tape. Mr. Cole contacted the Lansing Curtis Mathis store manager, Dennis Peters, to see if this was a good price. Mr. Peters said it was,[4] so Mr. Cole decided to buy 4000, and in turn sell them at a profit to Mr. Peters. Mr. Cole and Mr. Peters met Mr. Huddleston in Lansing on April 20, where Mr. Huddleston sold 4000 tapes to Mr. Cole for $10,000, who in turn sold them to Mr. Peters for $12,000. Mr. Huddleston gave them a receipt, signing his own name. (R. 115-121). Both managers testified they thought the sale was legitimate—otherwise, they would not have become involved. (R. 123,339). This sale was the subject of Count One of the indictment charging Mr. Huddleston with the knowing sale of stolen goods valued at more than $500 contrary to 18 U.S.C. § 2315. Mr. Huddleston was acquitted of this count.

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[4]Dennis Peters was called as a witness by petitioner. He corroborated Mr. Cole's and petitioner's testimony concerning the sale in Lansing. He said he did not think the $3 per tape price was too low—he had bought T-120 VHS blank tapes in volume for as low as $2.70 per tape. He also had seen Memorex brand tapes for as low as $4.15 retail. (R. 339-340, 342, 346).

Mr. Hall testified he was contacted by a woman from Magic Rent-to-Own, who was offering VHS tapes in lots of 500. She said she had 2,500 left. He ordered 500 at $3.00 per tape. (R. 136-138). Mr. Huddleston first made delivery on April 23, 1985, but because of a dispute about whether he would accept a personal check for part payment, final delivery was made on April 25, 1985. He accepted a cashier's check and a personal check in payment, and provided Mr. Hall with a receipt, with his own signature, and the address of Magic Rent-to-Own, telling Mr. Hall that he could exchange any defective tape at that address. (R. 137-139, 153-155). Mr. Hall, like Steven Cole and Dennis Peters, testified he thought the sale was legitimate. (R. 142-147). This transaction was the subject of Count Two of the indictment charging Mr. Huddleston with the knowing possession of stolen goods valued at more than $100, contrary to 18 U.S.C. § 659, of which he was convicted.

The only other testimony relating directly to the actual charges was from Mr. Huddleston. His testimony was entirely consistent with that of Ms. Curry, Mr. Cole, Mr. Peters, and Mr. Hall, except he denied Ms. Curry's claim that he told her initially the tapes were directly from the manufacturer and had been purchased for at least $1 per tape. Mr. Huddleston said that he first learned of the tapes when Leroy Wesby called him on April 16 or 17, 1985, telling him he had some VHS tapes for sale, and that he wanted Mr. Huddleston to find buyers for him. Mr. Wesby did not say how many tapes he had, but told Mr. Huddleston he got them from a warehouse in Texas. (J.A. 55). In direct response to Mr. Huddleston's question, Mr. Wesby told him the tapes were not stolen. (J.A. 45). Mr. Huddleston's belief that the tapes were not stolen was supported by his employee Eric Osborn telling him

that Karen Curry told Osborn she had checked with the Ypsilanti police, and found the tapes were not stolen. (J.A. 47).

Huddleston stated he was involved in the sale of 6500 tapes. He said that the sale to Curtis Mathis was originally to take place in Flint, but was changed to Lansing by Mr. Wesby, who was out of state driving his truck. Mr. Wesby called him, saying that Ms. Wesby would have to make the delivery from their home in Ben[illegible] Harbor, Michigan, and that she would go no farther than Lansing. Mrs. Wesby brought the 6500 tapes in a U-Haul trailer. Upon completing the sale, Huddleston paid Mrs. Wesby $8100 of the $10,000 given to him by Mr. Cole. He kept the $1900 as his commission, less what he paid Ms. Curry. (J.A. 48-52). He also received a commission for the sales to Nowshowing Video (500 tapes), Movieland (500 tapes), and Aspen Records (1500 tapes). (J.A. 52-53). He said he didn't think the $3 per tape sale price was too low, because Dennis Peters told him that he had seen the tapes for as low as $3.25 to $3.89. (J.A. 54).

In order to support their contention that Mr. Huddleston knew the tapes were stolen, at the outset of the trial the government made a motion *in limine* to introduce evidence of both prior and subsequent similar acts, pursuant to Fed. R. Evid. 404(b). The government stated it intended to present evidence pertaining to the sale of television sets, V.H.S. movie cassettes, and refrigerators by Mr. Huddleston. Mr. Huddleston objected to the admission of such testimony at the time of the motion. The trial court then asked defense counsel what his defense would be. When the court learned it would be lack of knowledge, the court unequivocally ruled such evidence would be admitted because it had "clear relevance" to the question of whether Huddleston knew the tapes were

stolen. Nowhere in the record did the court engage in a balancing process weighing the probative value of such evidence against its prejudicial effect on petitioner.[5] (J.A. 5-11).

The court did not take the matter under advisement in order to see how the evidence would break, nor did the court indicate in any way it would change its ruling upon objection at trial. Defense counsel did not renew his objection when each of the similar acts were admitted. The trial court did give the standard limiting instruction concerning the use of such evidence at the end of the trial, but gave no such cautionary instruction at the time of admission (nor was the court requested to do so by defense counsel.) (J.A. 12).

Consequently, much of the government's case focused on the similar acts evidence, and the defense in turn, spent much of their case testifying about the televisions, refrigerators, and movie tapes. The government presented evidence of three similar acts:

(1) A month prior to the VHS tape sales, Mr. Huddleston helped to sell 38 twelve inch black and white television sets to Paul Toney for $28 each. (J.A. 24-33).

(2) A week after the sale of the VHS tapes, he talked to FBI undercover agent Robert Nelson about selling either 10,000 VHS movies at $13.70 per tape (according to Mr. Huddleston) (J.A. 61,68-70), or 10,000 such tapes at $1.57 each (according to agent Nelson) (J.A. 35-36); and about selling 800 Zenith 19" color television sets at $200 each. (J.A. 35-36).

(3) He attempted to sell Amana refrigerators, ranges and icemakers to agent Nelson on May 2, 1985. (J.A. 38-40).

[5]The court of appeals in footnote 6 of its initial decision states that the trial court did make such a finding. (Pet. App. D-4). If the court did, it must have been a finding implicit in the ruling admitting the evidence, because the balancing did not occur on the record.

Mr. Huddleston and agent Nelson testified in detail about their dealings in May. Following the sale of the 6500 tapes, Mr. Huddleston was in Benton Harbor, Michigan at the Wesby residence.[6] Mr. Wesby showed him a list of VHS movies, saying he was in the process of purchasing a large quantity of the movies on the list, and that he would sell them for $15 to $18 per movie. (J.A. 57-58). He also told Mr. Huddleston he might be buying 800 Zenith TV's. (R. 283). Mr. Wesby later called Mr. Huddleston and told him he actually had in his possession 28 Amana refrigerators which he wanted help in selling at a unit price of between $325 and $375, for a total price of $10,000. (J.A. 55,59,70).

Mr. Huddleston again went to Ms. Curry to ask her to arrange a sale to retailers. (J.A. 56). By this time, Ms. Curry had been told by the FBI that the tapes were reported stolen, but was instructed not to tell this to Mr. Huddleston. (J.A. 18). She instead went to the FBI, and arranged for Mr. Huddleston to meet with agent Nelson, who was posing as a buyer for Highland Appliance, a large chain of stores selling appliances, televisions, audio equipment, etc. (J.A. 56).

They met on May 1, 1985. (R. 214). They each testified that Mr. Huddleston talked about possibly having for sale the VHS movie tapes, and Zenith color televisions. (J.A. 34-36; 58-62). As was stated *supra*, p 9, they

[6]Mr. Huddleston testified he lived and worked in Benton Harbor as a licensed building and mechanical contractor until he moved his business to Ann Arbor in 1981. However, after moving, he had a number of weatherization contracts with local governments through H.U.D., one of them being in Muskegon, Michigan, which is near Benton Harbor on the west side of the state. (R. 234-236; 257-260, 262). Mr. Huddleston personally met Mr. Wesby in November 1984 through Rev. Ellis Hull, a contractor in Benton Harbor under whom Mr. Huddleston received his training. (J.A. 43).

disagreed about the number of movie tapes mentioned and the sale price of them.[7] Agent Nelson was primarily interested in purchasing the VHS tapes and televisions. However, when Mr. Huddleston stated he could not deliver 100,000 movie tapes like agent Nelson wanted, he then offered to sell the Amana refrigerators. Both attested that agent Nelson was not interested in purchasing the refrigerators, and the meeting ended. (J.A. 38; 61).

The major point of contention between agent Nelson and Mr. Huddleston was the origin of the items Huddleston offered to sell Nelson. Nelson testified that at one point in the meeting, Mr. Huddleston said the items "were not hot," but at another point he said "most of it is not hot." (J.A. 41-42). Mr. Huddleston categorically denied ever telling agent Nelson any of the merchandise was hot. He testified he in fact told agent Nelson that none of the merchandise was hot. (J.A. 59-60). (Agent Nelson was wearing a body monitor. However, some of the tape was unintelligible, and neither it nor a transcript of it, was introduced into evidence. (R. 183). In both Judge Nelson's dissent to the original opinion of the court of appeals below (Pet. App. D-12), and in the per curiam opinion on rehearing (Pet. App. C-3), he was under the misimpression that either the tape or transcript was admitted into evidence, "confirming" the testimony of the FBI agent. Such is not the case. The jury was instead left with making a credibility decision between agent Nelson and Mr. Huddleston.)

The next day, the FBI received a teletype that a shipment of Amana refrigerators had been stolen. Agent

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[7]Mr. Huddleston's claim that the sale price was $15.70 per tape is buttressed by Ms. Curry's testimony that this was the price mentioned to her when Mr. Huddleston asked her to contact retailers. (J.A. 20).

Nelson immediately decided to buy the refrigerators, and called Mr. Huddleston to arrange it. (J.A. 39). The delivery was to be made in Ann Arbor. Leroy Wesby drove a semi-trailer to Ann Arbor that afternoon. Mr. Huddleston and Mr. Wesby were then arrested by the FBI.[8] (J.A. 40). Mr. Huddleston testified he was surprised at being arrested, because in direct response to his questions Mr. Wesby told him the refrigerators were not stolen, just as Mr. Wesby had done with the black and white televisions, and the VHS blank tapes. Mr. Huddleston said his brief was supported by there being no police report of the televisions and tapes being stolen. He also thought that the price for which he sold the refrigerators was fair, based upon his seeing the same units for sale at a local appliance store for $389 to $450 retail. (J.A. 62, 65-66).

Three witnesses testified about the sale of new 12" black and white televisions—Paul Toney, attorney Lewis, and Mr. Huddleston. Mr. Toney was a record shop owner in Benton Harbor who knew Mr. Huddleston. He said Mr. Huddleston showed him one of the televisions in February, 1985, telling him that a group of people had purchased 700 or 800 of the televisions, and that they were for sale for $33, but if 10 or more were purchased, the price was $28. (J.A. 24-26). Mr. Toney came to Ann Arbor on March 7, and Mr. Huddleston took him to the Magic Rent-to-Own store in Ann Arbor where there were approximately 150 of the televisions on display for sale at $28 a piece. Mr. Toney bought 20 from the store (not from Mr. Huddleston).

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[8]Only Mr. Huddleston was charged in this case. Both he and Mr. Wesby were charged in a separate indictment in the same court with possession of the stolen Amana appliances. Case No. 85-CR-90015-AA.

After selling them, he decided to bypass Mr. Huddleston, and called the store directly in order to buy 50 more. However, the woman managing the store said 100 were for a weekend show; she therefore would allow him to buy only 18 more. (J.A. 26-29).

Shortly after this last purchase, Mr. Toney said he contacted Mr. Huddleston about purchasing more televisions. Mr. Huddleston said they had purchased a truckload of blank cassette tapes, and that those had to be sold before more televisions could be purchased. The quoted purchase price was $2.75 per tape. Mr. Toney did find buyers for two small lots of the tapes, but Mr. Huddleston never made delivery. (J.A. 30-31).

Mr. Huddleston was not asked by either counsel about his involvement with Mr. Toney. Mr. Huddleston did testify that he first did business with Mr. Wesby when he acted on Wesby's behalf as the middle man in the sale of 770 of the black and white televisions to attorney Lewis. (J.A. 43-44,64). He and Mr. Lewis detailed their meeting with Wesby in Grand Rapids, Michigan, at Mr. Lewis' law office. (J.A. 63,64; 71-76). Mr. Wesby had driven a truckload of television there. Before buying them for $12,000, Mr. Lewis and his investigator did a background check on Mr. Wesby. Wesby had provided them with the card of Ellis Hull, a minister in Benton Harbor who was a client of Mr. Lewis. Rev. Hull told Mr. Lewis that Mr. Wesby was a former partner of his, and was an assistant minister at his church. (J.A. 72-74).

Mr. Lewis said other things besides Mr. Wesby's relationship with Rev. Hull led him to believe this was a legitimate business deal. First, Mr. Wesby and Mr. Huddleston sayed in Grand Rapids overnight so that Mr. Lewis could cash a settlement check to pay Mr. Wesby for the televisions, and pay Mr. Huddleston his commission. (J.A.

44; 74).[9] Second, he did not think such a large number of televisions could be stolen. (J.A. 75). Third, Mr. Wesby provided Mr. Lewis with a bill of lading, and Mr. Lewis had him sign a bill of sale. (J.A. 44; 76). Mr. Lewis did not have the documents with him when he testified, but stated he had them at his office. (J.A. 76). Mr. Lewis then proceeded to sell these 770 televisions right out of his Magic Rent-to-Own store in Ypsilanti. (J.A. 75).

On appeal, in a divided opinion, the United States Court of Appeals for the Sixth Circuit reversed Petitioner's conviction on October 8, 1986, reported at 802 F.2d 875 (Nelson, J., dissenting), holding that evidence of the prior similar transaction by Huddleston involving the black and white televisions should not have been admitted under Fed. R. Evid. 404(b) because the government did not prove by clear and convincing evidence that the televisions were stolen. (Pet. App. D-1). The government's attorney "admitted at oral argument . . . that no clear and convincing proof was presented to the trial court that the televisions were stolen or that appellant knew that they were stolen." (Pet. App. D-6). The court stated in footnote 5 that "the government's only support for the assertion that the televisions were stolen was the appellant's failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price." (Pet. App. D-3). The court noted that unlike the tapes and the Amana appliances, the government presented no evidence as to the origin of these televisions, and did not even attempt to show that the sets were stolen from an interstate shipment.

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[9]Mr. Huddleston was acting as a middle man in each of the described transactions, and was to receive a commission from Mr. Wesby for each sale he arranged.

The court held that the trial court abused its discretion in admitting evidence concerning the sale of the televisions, reasoning that the government should not have been allowed to present such misconduct evidence when it could not show that there was any misconduct as to the televisions. The sale of the televisions therefore had no proper probative value, and consequently, the prejudicial effect of the admission of the sale of the televisions cutweighed the nullity. In reversing, the court held that the admission of the evidence affected Huddleston's "substantial rights" under Fed. R. Crim. P. 52(b), and was not harmless beyond a reasonable doubt. (Pet. App. D6-D7).

The government petitioned the court for rehearing, arguing that the court's decision was inconsistent with the decision of another panel of the Sixth Circuit Court of Appeals issued one month earlier in *United States v Ebens*, 800 F.2d 1422 (6th Cir. 1986). The court granted the petition, and by amended opinion dated February 20, 1987, vacated its earlier decision, ruling that the clear and convincing evidence standard does not govern the admissibility of "similar acts" evidence under Fed. R. Evid. 404(b) in the Sixth Circuit. (Pet. App. C-1). It instead applied the "preponderance of the evidence" standard applied in *Ebens*, and found under that reduced standard that the district court did not abuse its discretion in admitting evidence of the television sets. The court further ruled that even if the trial court erred in letting the jury hear about the televisions, such error did not "substantially sway the judgment". *Kotteakos v United States*, 328 U.S. 750, 768 (1946). It found that the "harmless beyond a reasonable doubt" standard announced in *Chapman v California*, 386 U.S. 18 (1967) was not applicable to a similar acts evidence ruling because it was not of constitutional magnitude.

SUMMARY OF ARGUMENT

In his first argument, Petitioner Guy Huddleston contends that the District Court abused its discretion in allowing the government to present evidence concerning the prior sale of televisions when the government did not show by clear and convincing evidence that the televisions were stolen. Petitioner asks this Court to adopt the requirement that the preliminary question of whether misconduct evidence has been committed, be proven by clear and convincing evidence before it is admitted under Fed. R. Evid. 404(b), and require that the federal trial courts determine this under Fed. R. Evid. 104(a) out of the presence of the jury. If such burden is met, petitioner further urges this Court to require the government to show that the probative value of such misconduct evidence outweighs the prejudicial impact on the defendant.

Only this procedure will guarantee the fairness and integrity of our federal criminal trials. These requirements will make certain that a jury only hears such bad character evidence when the misconduct has actually been proven and when it is more probative than prejudicial. These requirements guarantee that a defendant is convicted because the government proved he committed the crime charged beyond a reasonable doubt, not because they proved he was a bad man either before or after the crime charged. They strike a balance between the competing concerns of the first sentence of Rule 404(b) vis-a-vis the second sentence.

Petitioner's position is supported by a majority of the states, by a majority of legal commentators, by federal common law prior to adoption of the rules of evidence, and by four federal Circuit Courts of Appeals. The straight forward probative/prejudicial balancing test espoused here (following the prerequisite clear and convincing standard

of proof having been met) is also supported by the Advisory Committee Notes to Rule 404(b).

Contrary to the government's position, the Congressional history behind Rule 404(b) does not mandate otherwise. Such history does not speak to the prerequisite standard of proof required for admission of misconduct evidence under Rule 404(b), nor is the standard of proof mentioned in the Rule itself. From this omission, this Court cannot assume that Congress intended to dismember the federal common law requirement that the misconduct must be shown by clear and convincing evidence before it is sufficiently probative to be admitted under Rule 404(b). Moreover, the interplay of Rules 404(a), 404(b), 403, 104 (a) and 104(b) is not clear either from the language of the Rules, or Congressional intent.

In his second argument, Petitioner contends that even if this Court adopts the prerequisite preponderance of evidence standard of proof followed by five federal Circuit Courts of Appeals (including the Sixth Circuit, which followed this standard below), the government did not prove by a preponderance of the evidence that the televisions were stolen. The only evidence the government submitted on this question was the relatively low price of the televisions. If the government were the plaintiff in a civil case trying the issue of whether the televisions were stolen, and presented such flimsy evidence, the defendant would surely win a motion for a directed verdict of no cause at the close of the government's proof. Therefore, under either prerequisite standard of of proof, the government did not show that the televisions were stolen, and the trial court abused its discretion in admitting such evidence.

Finally, the erroneous admission of this evidence was not harmless error. The court of appeals here originally

reviewed this matter under the plain error standard of Fed. R. Crim. P. 52(b), and found that the admission of such evidence affected the substantial rights of petitioner, and resulted in a miscarriage of justice. This is almost identical to the standard for reviewing unconstitutional claims of error under *Kotteakos v United States, supra* at 768. In view of the length of the jury's deliberations, the fact that they arrived at a split verdict of acquittal on one count and conviction on another, and that it is impossible to tell the rationale behind such verdict, it cannot be said with fair assurance that the erroneous admission of the evidence concerning the televisions did not have a substantial influence on their verdict. As such, Petitioner's conviction should be reversed.

ARGUMENT I

ONE OF THE PREREQUISITES FOR ADMISSION OF MISCONDUCT EVIDENCE UNDER FED. R. EVID. 404(b) SHOULD BE PROOF OF THE MISCONDUCT BY CLEAR AND CONVINCING EVIDENCE.

The court of appeals recognized in its initial opinion reversing Petitioner's conviction that "[n]o evidence was presented at trial showing that the televisions were stolen." 802 F.2d 875, 876. (Pet. App. D-31). The court further noted that "the government's only support for the assertion that the televisions were stolen was the appellant's failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price". *Id.* n. 5. (Pet. App. D-3). Unlike the tapes and the Amana appliances, the government presented no evidence as to the origin of these televisions. They did not even attempt to show that the sets were stolen from an interstate shipment. The government's attorney admitted during oral

argument in the court of appeals that it had not presented clear and convincing proof to the trial court that the televisions were stolen or that Mr. Huddleston knew they were stolen. (Pet. App. D-6). It is little wonder that the court of appeals agreed, and found that the government did not present "clear and convincing proof" that the televisions were stolen. In reversing, the panel majority reasoned that the trial court abused its discretion in allowing the government to present such misconduct evidence when it could not show that there was any misconduct with regard to the televisions.

Petitioner contends that in view of this lack of evidence, even under the preponderance of the evidence standard adopted by the court of appeals on rehearing, evidence of the televisions should not have been admitted. Attorney Lewis' failure to bring the bill of lading to trial, and the relatively low price of the small black and white televisions does not outweigh the testimony of Mr. Lewis that Mr. Wesby presented him with a bill of lading, that Lewis in turn sold the 770 sets right out of his store, and the fact the government presented (and to this day possesses) no evidence as to the origins of the televisions.[10] Thus, under either standard, the jury should not have been told about the televisions.

However, in view of the court of appeals' amended decision to the contrary, Petitioner must address the ques-

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[10]Judge Nelson emphasized in both his dissent to the original opinion, and in the later per curiam opinion that attorney Lewis did not present the bill of lading at trial. Such analysis seems contrary to the fundamental precept of our American criminal justice system that the government has the burden of proof. See *In re Winship*, 397 U.S. 358 (1970). Petitioner wonders why Judge Nelson did not instead emphasize the fact that the government had no evidence at trial and has no evidence two years later showing that the televisions were stolen. They simply cannot show the origin of the televisions.

tion of the standard of proof. Moreover, the government has argued in its brief on petition for certiorari that this Court should reject both standards as being too restrictive and contrary to Congressional intent. They suggest that "similar act" evidence offered for a proper purpose under Fed. R. Evid. 404(b) should be admitted as long as its probative value is not outweighed by its prejudicial effect under Fed. R. Evid. 403. (Res. 9-11). Therefore, the standard of proof could be critical to Petitioner.[11]

Petitioner has been able to find only one other reported appellate case where a change from the clear and convincing standard to the preponderance standard made a difference in outcome. In *United States v Beechum*, 555 F.2d 487 (5th Cir. 1977), the court initially reversed a theft from the United States mail conviction by a 2-1 decision, holding that the trial court abused its discretion in admitting evidence that the postal employee defendant also possessed two credit cards which were allegedly stolen, when the government could not prove the credit cards were stolen by clear and convincing evidence. On rehearing en banc, the court rejected the clear and convincing standard, and adopted the preponderance of evidence standard in a 10-5 decision. *United States v Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). It

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[11]This Court could, however, avoid making a decision on the standard of proof question by finding that regardless of the standard used, any error in admitting evidence of the televisions was harmless.

However, this Court should make a decision on the standard of proof for three reasons: 1) Because of the importance of this evidentiary question to the administration of criminal justice. See n. 21, *infra*. 2) Deciding the harmless error question before deciding whether there was error puts the cart before the horse. 3) Regardless of which harmless error test is applied, admission of the prior sale of the televisions was not harmless. See Argument II, *infra*.

found that the government had proved the credit cards were stolen by a preponderance of the evidence, and affirmed the conviction.[12]

The court of appeals here relied heavily on the *Beechum* en banc majority decision in rejecting the clear and convincing standard. The court enunciated three reasons for rejecting the higher standard: 1) Another panel of the court applied the preponderance standard three weeks before the initial decision here. *United States v Ebens, supra.* (Pet. App. C1-C2). 2) The decisions of the circuits which have adopted the preponderance standard are better reasoned than the decisions of the circuits which follow the clear and convincing standard. 3) Those circuits which follow the clear and convincing standard did so prior to the Federal Rules of Evidence on the basis of concerns now dealt with adequately in Fed. R. Evid. 403. (Pet. App. C4-C5).

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[12]*Beechum* in the only en banc decision on this issue. It also is the only decision in which a Circuit Court of Appeals has rejected a standard previously adopted by that circuit. Before this case, the Sixth Circuit had never been faced with a case where the difference in standards affected the outcome of the appeal. See *United States v Dabish*, 708 F.2d 240, at 243 n. 2 (6th Cir. 1983; and *United States v Vincent*, 681 F.2d 462, 465 (6th Cir. 1982) where the court recognized that the majority of circuits have adopted the clear and convincing standard, but that the facts in neither case required choosing between the standards. *Ebens* is similar to *Dabish* and *Vincent*, in that deciding between the standard was not necessary to the court's decision. The *Ebens* court did not engage in any analysis as to which was the more appropriate standard to adopt. The court merely noted that under *United States v Leonard*, 524 F.2d 1076, 1090-91 (2nd Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), courts may admit prior bad acts evidence if the prerequisite preponderance of evidence standard is met. *Ebens*, at 1432. The court immediately went on to note the dichotomy in standards, and concluded that "it was an abuse of discretion under either test to have admitted the testimony." (that Ebens supposedly made racial epithets toward Blacks eight years before killing Vincent Chin) *Id.* at 1433.

The court implies that the clear and convincing standard is antiquated, and not needed in the face of the "protections" of Rule 403.[13] Petitioner respectfully disagrees with the court's analysis.

First, the decisions which still require the government to prove the misconduct to the trial judge by clear and convincing evidence before the court considers the probative versus prejudice question, are not antiquated. Four circuit courts today follow the clear and convincing rule. In the well reasoned dissent of Judge Goldberg to the en banc decision in *Beechum*, at 922, he recognized that the Seventh, Eighth, and Ninth Circuits calmly preserved the clear and convincing proof standard shortly after the adoption of Rule 404(b), citing for authority pre-Rule 404(b) cases, post-Rule 404(b) cases, and the rule itself.

The Eighth Circuit still follows the three-part test it followed prior to the adoption of the federal rules: the extrinsic offense must be proved by clear and convincing evidence; its probative value must outweigh its prejudicial effect (contrary to the language of Rule 403); and the extrinsic offense must be "similar in kind and reasonably close in time" to the charged offense. *United States v Bledsoe*, 531 F.2d 888, 891 (8th Cir. 1976); *United States v Nabors*, 761 F.2d 465 (8th Cir. 1985).[14]

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[13]Fed. R. Evid. 403 provides:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[14]But see *United States v Weber*, 818 F.2d 14 (8th Cir. 1987), where the court still follows the clear and convincing test, but states that once this prerequisite is met, the evidence is admitted

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The Ninth Circuit has termed Rule 404(b) a codification of prior case law. *United States v Rocha*, 553 F.2d 615, 616 (9th Cir. 1977). See also *United States v Herrera-Medina*, 609 F.2d 376, 379 (9th Cir. 1979) where the court interprets 404(b) as not favoring the admission of similar acts evidence. And like the Eighth Circuit, the Ninth Circuit requires the government to show that the evidence offered is relevant, and that it is more probative than prejudicial, despite the opposite language concerning the admission of relevant evidence under Rule 403. *United States v Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979); *United States v Alphonso*, 759 F.2d 728, 739 (9th Cir. 1985).[15]

The Seventh Circuit has continued its use of the same three-part test used by the Eighth and Ninth Circuits, calling the test "well established." *United States v Feinberg*, 535 F.2d 1004, 1009 (7th Cir. 1976); *United States v Leight*, 818 F.2d 1297, 1302 (7th Cir. 1987). It too requires the court to exclude the evidence unless the probative value outweighs the prejudicial effect, contrary to the language of Rule 403.[16] After the *Beechum* decision, the D.C. Circuit has also adopted the clear and convincing standard. *United States v Lavelle*, 751 F.2d 1266 (D.C. Cir.),

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unless the potential prejudice substantially outweighs the probative value. The latter is the exact language found in Rule 403. However, the *Weber* court nowhere cites Rule 403.

[15]But like certain panels of the Eighth Circuit, once the misconduct has been shown by clear and convincing evidence, certain panels of the Ninth Circuit apply the balancing test contained in Rule 403, actually citing it by name. *United States v Vaccaro*, 816 F.2d 443, 453 (9th Cir. 1987), citing *United States v Bailleaux*, 685 F.2d 1105, 1109-10 (9th Cir. 1982).

[16]But again see *United States v Beasley*, 809 F.2d 1273, 1275 (7th Cir. 1987), citing and applying the Rule 403 balancing test, after first finding that the misconduct had been proved by clear and convincing evidence.

cert. denied, 474 U.S. 817 (1985). However, unlike the Seventh, Eighth, and Ninth Circuits, the D.C. Circuit applies the Rule 403 balancing test, admitting the evidence unless its prejudicial effect substantially outweighs its probative value.

Second, the court of appeals here is wrong in its analysis that the concerns of federal courts about bad character evidence are now dealt with adequately in Rule 403. As Judge Goldberg recognized in his dissent in *Beechum*, *supra* at 919-921, a literal reading of Rule 403 shows the rule offers almost no protection to criminal defendants. If Rule 403 is the only consideration (as the government here argues it should be), then once the bad character evidence under 404(a) is pidgeonholded into one of the categories of 404(b), it is admitted, unless the prejudicial effect substantially outweighs the probative value. It is hard to imagine any kind of bad character evidence which cannot be used by the government to show a criminal defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Such analysis loses sight of the long held basic tenet of our jurisprudence enunciated in the first sentence of both Rule 404(a) and (b): that a defendant's character, and evidence of his prior misconduct is not in issue. Courts must be extremely careful to guard against the danger that a defendant will be convicted because he is a bad man, or because he has committed crimes or misconduct in the past, rather than because the government introduced sufficient evidence to prove he is guilty beyond a reasonable doubt of the offense for which he is being tried. Although the rule's underlying rationale has been explained in diverse terms, this Court accurately summarized forty years ago:

> "The inquiry is not rejected because character is irrelevent; on the contrary, it is said to weigh too much with the jury and to overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge."

Michelson v United States, 335 U.S. 469, 475-476 (1948) (footnote omitted).

As Judge Goldberg recognized in the original panel decision of *Beechum*, the admission of prior misconduct evidence of the defendant seriously threatens the integrity of a criminal trial for three reasons:

> "First, the jury may punish the defendant for the prior rather than the charged offense. Second, the jury may infer from the defendant's assumed guilt of the prior offense that he committed the charged offense. Third, the jury may infer that two incomplete or unproved offenses somehow cumulate to justify some punishment. This, of course, is the danger of bootstrapping, whereby a prosecutor uses an incomplete prior offense and an incomplete charged offense to reinforce each other, each providing the basis of an inference that completes the other." 555 F.2d 487, 508.

For this reason, the Seventh, Eighth, Ninth, and D.C. Circuits have preserved the protection of the prerequisite clear and convincing test.

However, a close reading of *Beechum* and the amended decision here shows that the courts did not rely solely on the supposed protections of Rule 403 to make certain that misconduct evidence is not erroneously admitted. *Beechum* requires the government to prove to the trial court the "preliminary question" of the misconduct by a preponderance of the evidence under Fed. R. 104(b).[17] Only after meeting this prerequisite does the court perform the bal-

[17]Fed. R. Evid. 104(a) and (b) provide, in pertinent part:
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ancing under Rule 403. (Pet. App. C-41; *Beechum, supra* at 413.

The Second, Fourth, Fifth, Eleventh (and now Sixth) Circuits all require the government to meet this prerequisite preponderance of the evidence standard before any probative-prejudice balancing. *United States v Leonard*, 524 F.2d 1076, 1090-91 (2nd Cir. 1975); *United States v Martin*, 773 F.2d 579, 583 (4th Cir. 1985); *United States v Beechum, supra;* and *United States v Dothard*, 666 F.2d 498, 501 (11th Cir. 1982). All but the Second Circuit do so by terming this a Rule 104(b) preliminary fact determination.[18]

Petitioner will admit that this Rule 104(b) determination prior to a Rule 403 probative-prejudice balancing offers more protection than what the government here is espousing. The government contends that Rule 104 has no place in the trial court's Rule 404(b) determination. They argue that once the misconduct is found to be relevant to one of the categories in 404(b), the court should merely decide whether there is "any basis" for the jury

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Preliminary Questions

(a) *Questions of admissibility generally.* Preliminary questions concerning . . . the admissibility of evidence shall be determined by court, subject to the provisions of subdivision (b).

(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Beechum equates "the introduction of evidence sufficient to support a finding of the fulfillment of the condition with "proof by a preponderance of the evidence."

[18]The Second Circuit requires the judge to not only determine that the misconduct has been proven by a preponderance of the evidence; the evidence must also be *substantially* relevant for a purpose other than merely to show a defendant's criminal character. *United States* v. *Cavallaro*, 553 F.2d 300, 305 (2nd Cir. 1977) [Emphasis added].

to conclude that the misconduct occurred. If there is, then the evidence is admitted under Rule 403 unless the prejudicial effect substantially outweighs its probative value. (Res. 10-11). The government's analysis offers no protection at all to criminal defendants. It turns Rule 404(b) from what was an exclusionary rule to an all inclusionary rule at the expense of a fair trial.

However, both the *Beechum* and government procedures have a severe flaw—under Rule 104(b), *as opposed to Rule 104(a)*, and under the government's argument, the question of whether the misconduct occurred is ultimately decided by the jury. As the Seventh Circuit recognized in *United States v Byrd*, 771 F.2d 215, 222 n. 4 (7th Cir. 1985), under the *Beechum* procedure of treating the admission of uncharged misconduct evidence as a matter of conditional relevancy under Rule 104(b), the judge is required to determine only that there is evidence from which the jury could find that the misconduct took place, i.e., a preponderance of the evidence. Once the court does, the evidence is admitted to the jury along with instructions that it should consider the evidence only if it finds that the misconduct took place. The government goes even further. It says the judge should let the jury hear about the misconduct if there is "any basis" for believing the misconduct occurred and the defendant committed it. The government makes no mention of any cautionary instruction telling the jury to ignore this evidence if the jury finds that the misconduct did not occur.

The *Byrd* court criticizes such procedure as being directly contrary to the policy behind Rule 404—that the jury should be shielded from bad character evidence labeled as misconduct evidence unless the misconduct really occurred. Submitting this question to the jury, like *Beechum* and the court of appeals (and the government) here suggests, even

with a cautionary instruction that it should ignore the evidence if it finds the misconduct did not occur, defeats the policy of shielding the jury from such evidence unless the misconduct did in fact occur. *See generally* 22 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5249 at 531-537 (1983); *id.* Supp.1987 at 547-548, 552, n. 61.7-61.8. Professor Wright points out that the *Beechum* court wrongly cites his treatise as supportive of its decision that the determination of the sufficiency of the proof of the misconduct should be submitted to the jury under Rule 104(b). Professor Wright, along with most other legal commentators, and the Seventh, Eighth, Ninth, and D.C. Circuits, argue that the question of admissibility of other crimes evidence should be decided solely by the judge *under Rule 104(a)*, using the higher federal common law standard of clear and convincing proof.[19] Wright, *id.* § 5249 at 531-535; and § 5239 at 439. The view that this is solely a judge question is supported by the Advisory Committee's Note to Rule 404(b) making the admission of misconduct evidence subject solely to an individualized determination by the trial judge. Note of Advisory Committee on Proposed Rules, 28 U.S.C. App. Rule 404, at 690-691.

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[19]Petitioner admits that the question of what standard of proof the judge is to use in deciding preliminary questions of fact is not specified in Rule 104(a). See Wright, *id.*, § 5053, Supp. 1987 at 127. However, because of such omission, the federal common law requirement of clear and convincing proof of similar acts evidence should be preserved. See Argument below, p. 36.

Even if one supports the government's position that Rule 104(a) and/or (b) has no place in a Rule 404(b) analysis, it is possible to argue that the prerequisite clear and convincing proof test is encompassed in the Rule 403 balancing test. See Wright, *id.*, § 5249 at 533. One can argue that the misconduct is not sufficiently probative unless it has been proven by clear and convincing evidence, or a preponderance of the evidence, whichever standard is followed.

Thus, the better reasoned decisions, contrary to the contention of the court of appeals here, are the Seventh, Eighth, Ninth, and D.C. Circuit opinions (and Judge Goldberg's dissent to the en banc decision in *Beechum*). Petitioner will admit that the court of appeals decision here does have the support of four other Circuits.[20] Conversely, the government's argument that there is no prerequisite to admission of 404(b) misconduct evidence other than a Rule 403 balancing is supported by only the First Circuit. *United States v Zeuli,* 725 F.2d 813 (1st Cir. 1984). The danger of following the government's position is found in *Zeuli, at* 817. The court states that Rule 403 is not:

> "an especially fertile source of assistance to criminal defendants. . . . Undue prejudice would seem to require exclusion only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence." (citation omitted).

It is extremely important to note that Professor Wright cites this case as "an example of the attitude that has undermined the intent of the drafters of Rule 404." Wright, *id.,* § 5250 Supp. 1987 at 605 n. 2.

Just as there is a split in the circuit courts of appeals over the prerequisite standard, and whether the question is presented to the jury, there is also a split in circuits (and often within an individual circuit) over the standard to be applied when weighing the probative value of misconduct evidence against the prejudicial effect to the defendant. Petitioner has already discussed the standards

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[20]This is counting the Second Circuit, which has the prerequisite preponderance standard, but does not submit the question of whether the misconduct was proven to the jury under Rule 104(b). *United States v Cavallaro, supra.*

applied by the First, Second, Seventh, Eighth, Ninth, and D.C. Circuits. See pp 21-22, 28, and n. 14-16, 18, *supra.* The Fifth Circuit in *Beechum, supra* at 915, n. 20; and the Eleventh Circuit in *United States v Astling,* 733 F.2d 1446, 1457 (11th Cir. 1984), apply the Rule 403 standard—the prejudicial effect must substantially outweigh the probative value. The Fourth Circuit, however, seems to engage in a straight probative versus prejudice analysis. *United States v Martin, supra* at 582. The Sixth Circuit, even though it followed *Beechum* in this case in adopting the preponderance of the evidence test and the 104(b) procedure, did not adopt the 403 balancing test. The Sixth Circuit has consistently required that the probative value of the misconduct evidence outweighs its prejudicial effect. *United States v Ebens, supra* at 1433.

The *Ebens* court cites the Advisory Committee Note to Rule 404(b) as supportive of its balancing rule—that the probative value of the misconduct evidence must outweigh the prejudicial effect, rather than the 403 rule that the prejudice must *substantially* outweigh the probative value. That Note provides:

> "*Subdivision* (*b*) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other

> factors appropriate for making decisions of this kind under Rule 403."

Note of Advisory Committee on Proposed Rules, *supra* at 690-691.

It is noteworthy that the Committee did not say that the trial judge must balance the factors listed in Rule 403 in precisely the manner Rule 403 provides. It merely provides that the judge consider the substantive factors listed in Rule 403. This reading is supported by two factors: 1) the Committee says that "no mechanical solution is offered"; and 2) nowhere in the note does the Committee say that the prejudicial effect must *substantially* outweigh the probative value. Petitioner argues that the common law allocation and measure of the burden of proof with regard to misconduct evidence was so well settled that absent explicit language in the legislative history, the courts are free under 404(b) to still require that the prosecution show that the probative value of misconduct evidence outweigh the generally heavy prejudicial effect to the defendant. Evidently, many of the circuit courts of appeals agree. See Imwinklereid, *Uncharged Misconduct Evidence*, § 18:28 at 58 (1982).

As was stated at the beginning of this Argument, Petitioner thinks that the government did not show the televisions were stolen by either clear and convincing evidence, or by a preponderance of the evidence. If this Court agrees, then it is not necessary to resolve the split in circuits. If this Court disagrees, then it must choose between one of four tests explicated above:

> 1) As a prerequisite to admitting misconduct evidence under 404(b), the government must prove the misconduct by clear and convincing evidence. The trial judge decides this under Rule 104(a). This test if followed by the Seventh, Eighth, Ninth, and D.C. Circuits. As Professor Wright indicates, this is the prevailing view of legal commentators, even after passage of the Federal Rule of Evidence. Wright, *ibid.* at 534. It is also the prevailing view of the state courts. Imwinklereid, *ibid.* § 2:08 at 20.

> 2) The prerequisite is instead proof by a preponderance of the evidence. This issue is decided by the trial judge under Rule 104(a). The Second Circuit alone follows this test.
>
> 3) The prerequisite is proof by a preponderance of the evidence under Rule 104(b). As such, the issue is also presented to the jury with a cautionary instruction that it is to determine whether the misconduct evidence occurred. This is the rule in the Fourth, Fifth, Eleventh, and now Sixth Circuits.
>
> 4) There is no prerequisite to admission as long as there is "any basis" for believing that the misconduct occurred and the defendant committed it. There is no Rule 104(a) or (b) analysis. If the judge finds there is any basis, and the prejudicial effect does not substantially outweigh the probative value under Rule 403, then the issue is submitted to the jury with no cautionary instruction that it can find the misconduct did not occur. This is the government's position. Only the First Circuit follows this procedure.

Petitioner does not think it is necessary for this Court to resolve the additional split between the circuits concerning which balancing test the trial court must use once the prerequisite test is made. The issue in this case is what is the proper prerequisite test, and whether the government met that burden of proof. It is not the balancing of the probative value versus prejudicial effect. However if the government's position is adopted, then it is arguable that there is "any basis" for believing that the televisions were stolen. As was explained in n. 19 *supra*, the probative-prejudicial test might then be critical—i.e., the less evidence there is to believe the misconduct occurred, the less probative the evidence is.

There are three different balancing tests followed by the circuits (and as was stated, often within an individual circuit):

1. The probative value of such evidence must outweigh the prejudice effect on the defendant.

2. The prejudice must outweigh the probative.

3. The prejudice must substantially outweigh the probative under Rule 403(b).

If this Court does resolve either of these splits, Petitioner urges the Court to require that misconduct evidence be proven by clear and convincing evidence before it is admitted under Rule 404(b), and to require that the federal trial courts make this decision under Rule 104(a) out of the presence of the jury. Petitioner further urges this Court to require the government to show that the probative value of such evidence outweighs the prejudicial impact on the defendant.[21] These are the only rules which adequately protect a defendant from bad character evidence allegedly being introduced in Rule 404(b) good sheep's clothing. See Judge Goldberg's dissent in *Beechum*, *supra* at 920. These are the only rules which will guarantee the integrity and fairness of our federal criminal trials. These rules make certain that a jury only hears bad character evidence when such evidence has truly

[21]If this Court does render a decision on these standards, it will be extremely important to federal jurisprudence and the conduct of federal trials. As Professor Imwinklereid noted in the preface to his voluminous book, *Uncharged Misconduct Evidence*, (which is devoted strictly to reviewing the evidentiary, procedural, and constitutional limitations on uncharged misconduct evidence):

> "The numbers alone tell the story: In most jurisdictions, alleged errors in the admission of uncharged misconduct are the most frequent ground for appeal in criminal cases; in many states, such errors are the most common ground for reversal; and the Federal Rule in point, Rule 404(b), has generated more reported cases than any other subsection of the rules." *Id.* at viii.

been proven and when it is more probative than prejudicial. These rules guarantee that a defendant is convicted because the government proved he committed the crime charged beyond a reasonable doubt, not because they proved he was a bad man either before and/or after the crime charged. As Judge Goldberg noted in his dissent: "Due process requires extreme vigilance against the contamination of a criminal trial with cheap and mean character slander, and against the conviction of a citizen for improper reasons." *Beechum* at 927.

As was stated, this argument is supported by a majority of the states, by a majority of the legal commentators, and by four circuit courts of appeals. The straight forward probative/prejudice test is supported by the Advisory Committee Notes, and by a majority of the circuit courts of appeals. Additionally, this rule preserves the federal common law rule which was exclusionary—evidence of other crimes was generally not admissible even if they were similar in nature to the crime charged. *See generally*, Reed, The Development of the Propensity Rule in Federal Criminal Causes 1840-1975, 51 U.Cin.L.Rev. 299, 303-304 (1982).[22] Prior to the adoption of Rule 404(b), only the Second and Tenth Circuits routinely rejected the general exclusionary rule, for an inclusionary one using a rule of conditional relevance similar to Rule 404(b). Reed, *id.* at 304, n. 39.

The primary reason the majority in *Beechum* rejected the federal common law is that they thought Congress, in

[22]Professor Reed wrote two other articles of interest on "propensity evidence". See Reed, Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials, 50 U.Cin.L.Rev. 713 (1981); and Reed, Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence, 53 U.Cin.L.Rev. 113 (1984).

adopting Rule 404(b), was calling for an inclusionary approach. *Id.* at 910, n. 12-13. There is no question from the House and Senate Judiciary Committee Notes that Congress intended the greater admissibility of similar acts evidence. See H.R. Rep. No. 93-650, 93rd Cong., 1st Sess. 7 (1973); S. Rep. 93-1277, 93rd Cong., 2d Sess. 24-25 (1974). After all, the federal common law generally excluded such evidence, regardless of how probative the evidence was, and regardless of whether the misconduct was proven, even if proven beyond a reasonable doubt.

However, contrary to *Beechum,* and especially contrary to the government's position, it is by no means clear that Congress promulgated Rule 404(b) in order to "ensure" the admission of bad character evidence whenever it could be pidgeonholed into one of the categories of Rule 404(b). At best, this portion of the legislative history represents merely the expression of a relative, not an absolute preference. The debate in Congress was over the question of whether the last sentence of Rule 404(b) should begin as it does now, "It may, however, be admissable * * *" versus the Supreme Court version, "This subdivision does not exclude the evidence when offered * * * to prove facts other than propensity." The Justice Department favored the latter wording, arguing that the word "may" might be interpreted as giving a trial judge the power to exclude relevant evidence of other crimes. See 1971, 117 Cong.Rec. 33650. The Department wanted the Rule to be clear that the trial judge had no discretion to exclude similar acts evidence. This objection was echoed by the U.S. Attorney for the District of Columbia, who feared that if trial judges were given any discretion to exclude such evidence, they would exercise it against the government to avoid reversals on appeal. See 1971 Cong. Rec. 33658.

Unfortunately for the Government, and fortunately for criminal defendants, the argument failed to sway the House Committee on the Judiciary, and the House enacted the Advisory Committee version without debate. Petitioner is cognizant of the Note from the House Committee stating it felt its language placed greater emphasis on admissibility than did the Supreme Court version. However, as the government argued in 1971, the Supreme Court version may have been interpreted as mandating the admission of Rule 404(b) evidence. The present discretionary language, "may be admitted", cannot be so interpreted. The government is now making the same argument it unsuccessfully made to Congress 17 years ago.

If Congress really intended to "ensure" the admissibility of 404(b) evidence, then why didn't it state so? Why doesn't the rule read, "It *will* be admissible to prove . . . motive," and so on? The reason is that the drafters of the rule knew that bad character evidence was fraught with the danger of prejudice. Otherwise, why reiterate the language of the general rule contained in Rule 404(a) —that bad character evidence is not admissible to prove that the defendant acted in conformity with that character—in the first sentence of 404(b). There was no reason to restate the general rule except for emphasis.

The same reasoning applies to the Rule 403 balancing process. As was pointed out on pp. 29-30, *supra,* and by the Sixth Circuit in *Ebens, supra,* the Advisory Committee Note actually calls for a straight forward probative/prejudice balancing test, rather than the Rule 403 test that *Beechum,* and the government here espouses. If Congress intended that the Rule 403 balancing test be used, why didn't it say so?

Finally, Rule 404(b) nowhere deals with the standard of proof issue facing the Court here. From this omission,

the government (and the First Circuit in *Zeuli, supra*) assumes that Congress intended to dismember a body of common law requiring that the misconduct be proved by clear and convincing evidence, and replace it with no protection at all. Why not instead assume that Congress intended to incorporate this test into the Rules. As was stated, Professor Wright agrees with Petitioner's analysis, calling *Zeuli* "an example of the attitude that has undermined the intent of the drafters of Rule 404." Wright, *id.*, § 5250, Supp.1987 at 605, n. 2.

Even the *Beechum* court is not willing to assume Congress intended to totally dismember federal common law on the burden of proof by its seeming omission. The majority recognized the presence of Rule 104. Unfortunately, as Professor Wright points out, they analyzed the matter under the wrong subsection of the rule. Wright, *id.* § 5249 at 531-535; Supp.1987 at 547-548, 552, n. 61.7-61.8. It should not be a jury question under 104(b); it should be a judge question under Rule 104(a), and the common law (and majority of states) requirement of proof by clear and convincing evidence should be preserved.[23]

Petitioner's analysis is supported by the existence of Rules 608 and 609, which are referred to specifically in subsection (c) of Rule 404. As Judge Goldberg emphasized in his dissent at 921, the *Beechum* preponderance of the evidence standard conflicts with the higher standards of proof required by Rules 608 and 609. For example, suppose Mr. Huddleston (who actually has no prior record) had been *convicted* of selling stolen televisions ten years before his trial here. Under Rule 609(b), if he took the stand, the government could not impeach him with this

[23]The question of what standard of proof the judge is to use in deciding preliminary questions of facts under Rule 104(a) is not stated. See n. 19, *supra*.

conviction unless the probative value of it *substantially outweighed* the prejudicial impact on the jury. Suppose instead that the evidence was clear and convincing that the televisions were stolen ten years ago. Under Rule 608, if Mr. Huddleston did not take the stand, this evidence could not be admitted. However, under Rule 404(b), as analyzed by the *Beechum* majority, the jury can hear about the ten year old televisions as long as the government shows by a preponderance of the evidence that they were stolen, and that the prejudicial impact of the evidence does not substantially outweigh the probative value. Under the government's argument, the jury can hear about them as long as there is "any basis" for finding them to be stolen.

This leads to, in Judge Goldberg's words, a bizzarre anomoly:

> "According to the majority under Rule 404(b) the government can submit with ease prejudicial, flimsy evidence of an extrinsic offense, but under Rule 609, where the crime was proved beyond a reasonable doubt, the admissions standards are much stricter. . . You might say then that, for purposes of admitting extrinsic offense evidence, the majority of this court may at times presume a defendant guilty until he is proven guilty beyond a reasonable doubt, at which point the court may begin presuming him innocent." *Beechum, supra* at 922.

This bizarre anomoly is very real, and sometimes horrific.[24]

[24]It leads to cases like *United States v Martino*, 759 F.2d 998, 1004-1005 (2nd Cir. 1985), where the Second Circuit followed the *Beechum* analysis in upholding under Rule 404(b) the admission of an 11 year old drug conviction under the Youth Corrections Act to show the defendant's intent in the charged drug offense. The Second Circuit has even stated in dicta that a 20 year old drug conviction would have been admissible under 404(b) as bearing on knowledge or intent. *United States v Terry*, 702 F.2d 299, 316 (2nd Cir.), cert. denied, 461 U.S. 931 (1983).

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This Court should not focus on Congressional intent, which is at best uncertain with regard to both the prerequisite standard of proof, and the probative/prejudice balancing test. Its primary concern should instead be on the effect of any standard adopted here on the federal criminal trial where human freedom is at stake. From the very beginning of its history, this Court has formulated rules of evidence to be applied in criminal trials. This power is derived from the exercise of its supervisory authority over the administration of criminal justice in the federal courts. This Court recognized 45 years ago that "in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance." *McNabb v United States*, 318 U.S. 332, 341 (1942). Here, the interplay of Rules 404(a) and (b), 403, and 104(a) and (b) is not clear either from the language of the Rules, or Congressional intent. The only way to ensure the integrity and fairness of our federal criminal trials is to adopt the three-part test of the Seventh, Eighth, and Ninth Circuits. The government is not hamstrung by such test—truly probative misconduct evidence which has clearly been committed by a defendant will be admitted to buttress the government's case. Conversely, the jury will not be prejudiced by other misconduct evidence not proven to have been committed, or not sufficiently probative to outweigh the prejudicial impact on the defendant. Under such test, both sides are provided with justice.

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The *Beechum* rule, and the government's analysis would even allow the admission of prior misconduct evidence where the defendant had been *acquitted* of the misconduct. See Wright, *id.*, vol. 2, § 410 n. 92. Obviously, if a grand jury returned an indictment, there was certainly "any basis" for thinking that the misconduct was committed, and there could have been a preponderance of evidence to think so.

ARGUMENT II

EVEN IF THIS COURT ADOPTS THE PROOF BY A PREPONDERANCE OF EVIDENCE STANDARD AS A PREREQUISITE TO THE ADMISSION OF MISCONDUCT EVIDENCE UNDER RULE 404(b), THE GOVERNMENT FAILED TO PROVE THAT THE TELEVISIONS WERE STOLEN BY A PREPONDERANCE OF THE EVIDENCE. THE TRIAL COURT THREFORE ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF THE TELEVISION TRANSACTIONS.

As was stated at the outset of Argument I, there is no question that the government did not prove by clear and convincing evidence that the televisions sold by Mr. Wesby to attorney Lewis, and later sold to Mr. Toney, were stolen. The government's attorney admitted such during oral argument in the court of appeals. (Pet. App. D-6). If this is the standard adopted by this Court, then the trial court abused in discretion is letting the jury hear about the televisions. *United States v. Dabish*, *supra* at 242. The only remaining question would be whether the error was harmless. That issue will be discussed in Argument III below.

If this Court rejects the clear and convincing standard of proof as a prerequisite, and instead adopts the preponderance standard under either a Rule 104(a) or 104(b) analysis,[25] Petitioner contends that the court of appeals

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[25]As was pointed out in n. 19, *supra*, even if this Court were to accept the government's argument that Rule 104(a) and/or (b) has no place in a Rule 404(b) analysis, the Court could find that a prerequisite burden of proof test is encompassed in the probative/prejudice balancing test. See Wright, *id.*, § 5249 at 533. In other words, unless the misconduct is shown by clear and convincing evidence, or by a preponderance of the evidence (whichever standard is applied), then it is not sufficiently probative to engage in a probative/prejudicial analysis. In fact, the Seventh, Eighth, Ninth, and D.C. Circuit cases (and the in-

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was wrong in finding that the government met that standard. In its initial opinion reversing this case, the majority stated in footnote 5 that "the government's only support for the assertion that the televisions were stolen was the appellant's failure to produce a bill of sale of trial and the fact that the televisions were sold at a low price." (Pet. App. D-3)

The amount of evidence as to the origin of the televisions certainly did not change between the time of the court of appeals initial opinion and the later decision vacating that opinion. Simply put, the government did not even attempt to show the origin of the televisions. They have no evidence to this day showing that these televisions were stolen from interstate shipment. It must be remembered that the only evidence the government presented concerning the televisions was the testimony of Paul Toney. All he could say about the origin was that Mr. Huddleston told him that a truckload of televisions had been purchased, and told him that he could buy them at Mr. Lewis' Magic Rent-to-Own store in Ypsilanti. In other words, in reality, the only evidence the government presented showing that the televisions might have been stolen was the $28 price.[26] The preponderance of evidence standard is the burden of proof the plaintiff must sustain

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itial opinion of the Sixth Circuit here (Pet. App. D-5)) cited above as following the clear and convincing test, nowhere mention Rule 104. However, it is implicit in their holdings.

[26]Unlike the tapes and Amana appliances, there was no testimony concerning the retail value or the cost of manufacture of such televisions. The court of appeals seemed to take judicial notice from the fact that the televisions "sold like hotcakes" at that price, that the price was less than retail. However, this writer doubts that the $28 price was less than wholesale, and certainly not less than the manufacturer's cost.

in a civil trial. If the government were the plaintiff in a civil case trying the issue of whether the televisions were stolen, and presented such flimsy evidence, the defendant would surely win a motion for a directed verdict of no cause at the close of the government's proof.

The only evidence which was presented at the trial concerning the origin of the televisions was the testimony of Mr. Huddleston and Mr. Lewis. It cannot be overemphasized that this testimony was in direct response to the government being allowed to call Mr. Toney. The defense was forced to deal with the issue of the televisions by the court's ruling. Counsel for Petitioner clearly indicated to the court that he wanted to try the case on the issue of the tapes alone. (J.A. 6). The government, and the jury, would never had learned about the origin of the televisions if the court had correctly not allowed Mr. Toney to testify. It was from the testimony of Mr. Huddleston and Mr. Lewis that the government, the jury, and the court of appeals learned that Mr. Wesby was the original seller of these 770 televisions, and that Mr. Lewis could not find the bill of lading.

The proper procedure to determine whether a preliminary question of fact has been proven under Rule 104(a) or (b) is not to conduct a mini-trial. The moving party presents their proof out of the presence of the jury. If the party fails to meet the burden of proof (under 104(b), it is proof by a preponderance of the evidence), then the evidence is not admitted at trial and the matter is ended. If the party meets the burden, then the evidence is admitted. The opposing party can then attempt to dispute the evidence during trial. However, it has no right to present such evidence at the preliminary fact *in limine*

hearing, nor can it be forced to present such evidence. *See United States v Leight, supra* at 1303-1304.[27]

Here, the trial court did not require the government to show *by any standard of proof* that the televisions were stolen during the government's *in limine* motion. Once the court heard that the evidence had "clear relevance" to determining Mr. Huddleston's knowledge, and that lack of knowledge would be his defense, the court admitted the evidence. (J.A. 5-11). No probative/prejudice balancing was performed on the record. If the trial court had properly required the government to show the televisions were stolen by whatever standard of proof this court adopts, they could only have shown through Mr. Toney that the televisions were being sold for $28 right out of a retail store in Ypsilanti. The relatively low price of the televisions by no stretch of the imagination equals proof by a preponderance of the evidence.

However, because Mr. Toney was improperly allowed to testify during trial, the defense was forced to dispute the imputation that the televisions were stolen. A close reading of Judge Nelson's dissent below in the initial opinion, and the per curiam opinion vacating that opinion, shows that the conclusion that the preponderance of evidence standard was met was improperly based upon the defense testimony concerning the televisions. Judge Nelson emphasized that the defense could not produce a bill of lading, rather than emphasize that the government could not show from where the televisions came. (Pet. App. D9-D11). See n. 11, *supra*.

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[27]The Court in *Leight* held that the defendant on trial for murdering her child could not present evidence during a 404(b) *in limine* hearing to determine if the government could prove by clear and convincing evidence that she had killed two of her other children in a similar manner.

In reality, what the court of appeals did was bootstrap a finding that the government proved the televisions were stolen by infering such from the other similar acts testimony, coupled with the defense testimony that the televisions originated from Mr. Wesby. This is apparent from the following findings:

> "The evidence of Mr. Huddleston's other activities could reasonably be thought to have a high probative value. The televisions and the Memorex tapes both came from the same supplier, a truckdriver, and when the goods were presented to him, Mr. Huddleston did not ascertain what their source was, nor did he ask to see the truckdriver's bill of sale. Both the television sets and the tapes were sold at prices well below their value, and, in the case of the tapes, below the cost of manufacture. Other goods handled by Mr. Huddleston were shown to have been stolen, and a tape recording confirmed the testimony of the FBI agent that Mr. Huddleston referred to some of them as "hot." Taken as a whole, the evidence strongly indicated, as the government argued, that appellant was engaged in a pattern of illegal activity." (Pet. App. C-3).

The dangers of bootstrapping were discussed above in Argument 1 at p. 24, citing Judge Goldberg's dissent in *Beechum, supra* at 508. The court of appeals below in their initial opinion also discussed the dangers in the context of this case. The majority found the admission of the televisions not to be harmless because it afforded the jury the opportunity to draw an impermissible inference:

> "The government attempted to have the jury infer the television sets were stolen and from that inference in turn infer that since the appellant had sold "stolen" television sets earlier, he must have possessed and sold the stolen tapes here." (Pet. App. D-8-D9 n 9).

The court of appeals in its later decision inexplicably draws the same inference in finding that the government proved by a preponderance of the evidence that the tele-

visions were stolen. This inference was not based on Paul Toney's testimony about the price. It was instead based upon the defense testimony that the televisions came from Mr. Wesby, and the government testimony that everything else Mr. Wesby dealt in was stolen. With a proper 104(a) or (b) ruling, this defense testimony would never have had to be presented, and neither the government, the jury, nor the court of appeals would have learned that the televisions were at one time possessed by Mr. Wesby.

Even assuming arguendo that both the government and defense testimony during trial should be analyzed in making a decision on the question of the prerequisite standard of proof, the failure of the defense to produce a bill of lading and the relatively low price of the televisions does not outweigh the testimony of Mr. Lewis that Mr. Wesby presented him with a bill of lading, that Lewis in turn sold 770 of the televisions right out of his store, and the fact the government could not show, and cannot show today almost three years later that the televisions were stolen.

As such, under any method of analysis, the government did not meet its burden of proving by a preponderance of the evidence that the televisions were stolen. The trial court therefore abused its discretion in letting the jury hear about them.

ARGUMENT III

REGARDLESS OF WHICH HARMLESS ERROR TEST IS APPLIED, THE ADMISSION OF THE PRIOR SALE OF THE TELEVISIONS WAS NOT HARMLESS.

Questions of harmless error are to be decided by appellate courts from a review of the entire record. This Court has stated its reluctance to evaluate such claims. At the same time, it has indicated that it "plainly has the

power to do so." *United States v Hasting*, 461 U.S. 499, 510 (1984). In this case, if this Court agrees with Petitioner that the trial court abused its discretion in admitting evidence concerning the sale of the televisions, then it, like the court of appeals, is faced with whether the error was harmless. And as was recognized by this Court in *Hastings, supra*, "[s]ince this Court has before it the same record the Court of Appeals reviewed, we are in precisely the position of that court in addressing the issue of harmless error."

In the initial opinion here, the court of appeals found that the admission of the prior bad acts evidence was not harmless error. The court applied the harmless beyond a reasonable doubt test enunciated in *Chapman v California, supra*. However it is important to note that almost in the same breath, the court rejected the government's contention that petitioner's lack of contemporaneous objection at trial to the similar acts evidence prevented reversal, because admission of the evidence was not plain error under Fed. R. Crim. P. 52(b).[28] The panel applied the plain error doctrine, and found that:

> "[It] is clear that the admission of the prior acts *affected the 'substantial rights' of appellant:* especially since his defense at trial was that he did not

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[28]Fed. R. Crim. P. 52 provides:

Harmless Error and Plain Error

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

This rule of procedure is almost identical to 28 U.S.C. § 2111, which provides that "[on] the hearing of any appeal . . . , the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

know the tapes were stolen. Since it was plain error to admit evidence of the sale of the televisions without clear and convincing proof that they had been stolen, we find there was a miscarriage of justice. Thus, the issue was preserved for appeal." 802 F.2d 877-878. [Emphasis added]. (Pet. App. D-7).

On rehearing, the court of appeals rejected the *Chapman* harmless beyond a reasonable doubt test as inapplicable, stating that it was reserved only for claims of constitutional dimension. It instead applied the test enunciated in *Kotteakos v United States, supra* at 765, and found any error to be harmless.

Petitioner agrees with the court that the general trend of federal courts of appeals has been to reserve the *Chapman* test to claims of error of constitutional dimension.[29]

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[29]However, the *Chapman* test has not consistently been reserved only for claims of constitutional error by the federal courts of appeals. The Sixth Circuit Court of Appeals has applied the harmless beyond a reasonable doubt test to a claim of non-constitutional error under Rule 404(b) in *United States v McFadyen-Snyder*, 552 F.2d 1178, 183-184 (6th Cir. 1977). See also *United States v Rowan*, 518 F.2d 685, 691-92 (6th Cir. 1975).

For cases applying the *Chapman* standard to non-constitutional errors in other circuits, see Saltzburg, *Federal Rules of Evidence Manual*, Fourth Edition, Rule 103(a), Harmless error; Criminal cases, pp. 21-23. The Third Circuit has recently applied the harmless beyond a reasonable doubt test to claims of non-constitutional errors. *See Government of the Virgin Islands v Joseph*, 685 F.2d 857 (3rd Cir. 1982); and *United States v. Zarintash*, 736 F.2d 66 (3rd Cir. 1984).

Petitioner will admit, however, that the general trend in federal courts is to restrict the application of the *Chapman* test to errors involving constitutional claims. See *United States v Terry*, 729 F.2d 1063, 1069-79 (6th Cir. 1984); and *United States v Cunningham*, 804 F.2d 58, 61-62 (6th Cir. 1986) (both involving 404(b) claims of error).

This Court has never applied the *Chapman* test to nonconstitutional claims of error. *See, Connecticut v Johnson*, 460 U.S. 73, 88, n. 2 (Stevens, J., concurring). If this Court were to apply such test here, it should find, as the court of appeals did here in its first opinion, that the error was not harmless beyond a reasonable doubt.

And Petitioner is not claiming that the error here is of that dimension. However, he disagrees with the court's conclusion that the error here was harmless under the *Kotteakos* test.

An error under the *Kotteakos* test is deemed harmless unless it prejudices the defendant by having a "substantial and injurious effect or influence in determining the jury's verdict." *United States v Lane*, — U.S. — (1987), *citing Kotteakos, supra*. The court of appeals here in its amended opinion ruled that any error in admitting evidence of the prior sale of the televisions was harmless under *Kotteakos*. However, the court in its earlier opinion had already ruled that the error affected Mr. Huddleston's substantial rights, and resulted in a miscarriage of justice.

The decisions are irreconcilable—the plain error test under Fed. R. Crim. P. 52(b) is almost identical to the *Kotteakos* test. A close comparison of Rule 52(a) to Rule 52(b) shows that a harmless error is never plain error, and that a plain error is never harmless. A plain error affects substantial rights and results in a miscarriage of justice, which is no different than saying under *Kotteakos* that the error has a *substantial* and injurious influence on the jury's verdict.

Two of the judges of the court of appeals initially ruled that Mr. Huddleston's substantial rights had been violated and that he had suffered a miscarriage of justice. Four months later, the same two judges ruled that the same admission of evidence had not had a substantial effect on the verdict, and that Mr. Huddleston had not suffered a miscarriage of justice.

In view of this irreconcilability, Petitioner urges this Court to make its own decision on this question uninflu-

enced by the prior incompatible decisions. In doing so, this Court should first look closely at the way the Court in *Kotteakos*, at 763-765, said a reviewing court should approach a harmless error review:

> "[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how speculation comes out.
>
> • • •
>
> And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> • • •
>
> If when all is said and done, the conviction is sure that the error did not influence the jury or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous actions from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (citations omitted.)

The court of appeals in its later decision affirming Mr. Huddleston's conviction did not engage in an extensive analysis of the evidence, other than to emphasize the evidence of his activities subsequent to the sale of the tapes—i.e., that these later goods were shown to have been stolen, and the disputed conversation with agent Nelson

about whether these later goods were "hot" or not. (Pet. App. C-3). The court stated, "Taken as a whole, the evidence strongly indicated, as the government argued, that appellant was engaged in a pattern of illegal activity." The court went on to find that evidence of Mr. Huddleston's activities with the televisions prior to the VHS tape transactions were no more prejudicial that the eivdence about his activities after the tape transactions. Finally, the court said that the trial court's cautionary instruction minimized any prejudice.

Contrary to the admonition of this Court in *Kotteakos*, it appears that the court of appeals was substituting its judgment for that of the jury when it agreed with the government that "the evidence strongly indicated . . . that appellant was engaged in a pattern of illegal activity." This finding belies the length of the jury's deliberations—a day and a half—and the jury's verdict. The jury thought this was a close case. The government has continually argued on appeal that evidence of guilt was overwhelming. The jury didn't think so. They acquitted Mr. Huddleston on the April 19 sale, but convicted him of the April 25 possession. The verdicts are seemingly irreconciable. Nothing happened during that six day period which would lead the jury to believe that Mr. Huddleston had any more knowledge about the legitimacy of those tapes on April 25 than he had on April 19.

The government contends that the later acts evidence was much more damaging than the evidence concerning the televisions. Petitioner disagrees. Petitioner denied that he knew the *later* merchandise was stolen—the only evidence to the contrary was the testimony of the FBI agent, and even he admitted on cross-examination that Mr. Huddleston told him during their meeting that the merchandise *that he was proposing to sell to the agent*

was not hot. The prior merchandise, i.e., the televisions and blank VHS tapes, were not the subject of conversation.

More importantly, even assuming the subsequent act evidence was inherently more damaging than the prior act evidence, it still does not explain how the jury came to the conclusion that Mr. Huddleston knew the tapes were stolen on April 25, but did not know they were stolen on April 19. His meeting with the FBI agent did not occur until May 1.

Nothing occurred during the six day period from April 19 to April 25 which would have given Mr. Huddleston the knowledge that the tapes were stolen. It is impossible to tell why the jury reached their split verdict. The only evidence they had that Mr. Huddleston might be engaged in illegal activity prior to the sale of the tapes was his dealings with the televisions. This was the only evidence which related to his knowledge before the sale of the tapes. Petitioner contends that this Court cannot say with fair assurance that the jury was not substantially influenced by this error, when it cannot say why the jury concluded that Mr. Huddleston knew on April 25 that the tapes were stolen, but did not know it on April 19.

For the same reason, this Court should not find that the cautionary instruction minimized the error. This instruction was one of forty given by the court at the end of the trial. Additionally, since the court of appeals analyzed this case under Rule 104(b), this cautionary instruction should have also told the jury that they could completely ignore the television evidence if they found that the televisions were not stolen. *See United States v Byrd, supra.*

CONCLUSION

Petitioner's judgment of conviction should be reversed, and the case should be remanded for a new trial.

Dated: December 23, 1987

Respectfully submitted,
DON FERRIS
Attorney for Petitioner

RESPONDENT'S

BRIEF

No. 87-6

In the Supreme Court of the United States

OCTOBER TERM, 1987

GUY RUFUS HUDDLESTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, before admitting "similar act" evidence under Fed. R. Evid. 404(b), a district court must find that the similar acts have been proved by clear and convincing evidence.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. C1-C9) is reported at 811 F.2d 974. The initial opinion of the court of appeals (Pet. App. D1-D6) is reported at 802 F.2d 874.

JURISDICTION

The initial judgment of the court of appeals was entered on October 8, 1986. After the government filed a petition for rehearing, the court entered a new judgment on February 20, 1987, withdrawing the prior judgment and opinion and affirming petitioner's conviction. Petitioner then filed his own petition for rehearing, which was denied on April 30, 1987 (Pet. App. B1). The petition for a writ of certiorari was filed on June 27, 1987, and was granted on October 13, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 404(b) of the Federal Rules of Evidence provides:

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT

1. Petitioner was indicted on July 23, 1985, by a federal grand jury sitting in the Eastern District of Michigan. The indictment charged him with one count of selling stolen goods in interstate commerce, in violation of 18 U.S.C. (& Supp. IV) 2315, and one count of possessing stolen property in interstate commerce, in violation of 18 U.S.C. 659. The two counts related to two portions of a shipment of stolen Memorex video cassette tapes that petitioner was alleged to have possessed and sold, knowing that they were stolen. J.A. 3-4.

The evidence at trial showed that in early 1985, the Tandy Bell & Howell plant in Northbrook, Illinois, manufactured a number of Memorex T-120 VHS video cassette tapes. The company sold those blank tapes, at its manufacturing cost of $4.53 per tape, to its exclusive sales subsidiary, Memtech Products. Memtech then sold a batch of 32,448 tapes to the Michigan K-Mart Corporation at the price of $4.69 per tape and shipped them to K-Mart via an Overnight Express semi-trailer truck. The trailer was sent to a trailer yard in South Holland, Illinois, on April 11, 1985, because K-Mart was not scheduled to take delivery of the tapes until April 16. On the morning

of April 16, Overnight Express employees discovered that the trailer was missing. Tr. 40-52, 54-55, 57-63.

Two days later, petitioner contacted Karen Curry, the manager of the Magic Rent-to-Own store in Ypsilanti, Michigan. Petitioner, who was employed as a housing contractor in Ann Arbor, Michigan, asked Curry to help him sell approximately 20,000 blank video cassette tapes. Tr. 69-72. Curry asked whether the tapes were stolen, and petitioner replied that they were not "hot" (J.A. 13; Tr. 73). He told Curry that he had purchased the tapes directly from the Chicago manufacturer for $1.00 per tape and that he had a bill of sale for the tapes (J.A. 13; Tr. 73, 101). Petitioner never produced the bill of sale, and Curry later learned that petitioner had gotten the tapes from a man named Leroy (J.A. 13, 23; Tr. 95).

Petitioner told Curry that he wanted her to sell the tapes for $2.75 to $3.00 per tape. He said that he wanted only cash for the tapes, not checks, and that he wanted her to sell the tapes in lots of no fewer than 500 tapes to any one purchaser. Curry knew that $2.75 or $3.00 per tape for the blank Memorex tapes was an extremely low price. J.A. 12-23; Tr. 69-76, 93, 94-96, 101.

Curry asked an officer she knew with the Ypsilanti Police Department to check whether the tapes petitioner was trying to sell were stolen. The officer advised her that the Department had not received a report that the tapes were stolen. Curry then arranged to sell several thousand of the tapes to various local retailers. Petitioner promised to pay Curry 25 cents per tape for arranging the sales. J.A. 14-18; Tr. 74-77, 80-82, 83-85.

One of the persons Curry contacted was Steven Cole, the manager of a home entertainment store, who agreed to buy 4,000 of the Memorex tapes, which he then arranged to sell to an associate. Cole agreed to pay cash for the purchase and to take delivery of the tapes outside his store in

Flint, Michigan, but at the time set for the transfer, petitioner arrived and told Cole that he "didn't do business" in Flint. Cole subsequently arranged to take delivery of the tapes on a street corner opposite a shopping mall in Lansing, Michigan. Petitioner subsequently met with Cole at the designated location and unloaded the 4,000 Memorex tapes from a U-Haul van. Cole gave petitioner $10,000 in cash for the tapes. Tr. 103-110, 115-117. That sale formed the basis for the charge in Count 1 of the indictment.

During the same period, Curry contacted Ronald Hall, the owner of a video store in Livonia, Michigan. Hall agreed to buy 500 blank Memorex tapes for $3.00 per tape. Petitioner subsequently drove to Hall's store to make the delivery. When Hall tried to pay for the tapes by check, petitioner objected, saying that he wanted either cash or a cashier's check. Petitioner returned later, however, and agreed to take a company check for the tapes. Hall testified that he ordinarily had to pay between $5.50 and $6.50 for Memorex tapes of the type that he bought from petitioner for $3.00. Tr. 136-138. 146-150; see also Tr. 150-155. That sale formed the basis for the charge in Count 2 of the indictment.[1]

2. Prior to trial the government filed a motion in limine in which it stated that it intended to offer evidence of petitioner's prior and subsequent dealings in goods of suspicious origin. The government offered that evidence to show that petitioner knew the blank Memorex tapes were stolen, which was the only significant issue in dispute

[1] In addition to seeking her assistance in selling the blank Memorex tapes, petitioner in April 1985 asked Curry to help him sell a large number of video cassette movies for $15 apiece. He said he "wanted to get rid of the movies in one or two sales, if possible" and that he expected to sell the movies for between $135,000 and $157,000. J.A. 18-20; Tr. 85-88.

at trial (see Tr. 37-38 (defense counsel's opening statement)). The district court concluded that the government's evidence was admissible, in accordance with Fed. R. Evid. 404(b), for the purpose of showing petitioner's knowledge of the stolen character of the tapes. J.A. 5-11; Tr. 4-10.

The first piece of "similar act" evidence offered by the government was the testimony of Paul Toney, a record store owner in Benton Harbor, Michigan. Toney testified that he met petitioner at a Benton Harbor bar in February 1985. Petitioner arrived in the bar carrying a black and white television set and announced that he and several associates had a truckload of similar sets for sale at a very low price. Toney expressed an interest in the sets, and he arranged to purchase a number of them. Toney later traveled to the Magic Rent-to-Own store with petitioner, where Toney purchased 20 television sets for $28.00 each. Several days later, Toney purchased an additional 18 sets at the same price. Shortly thereafter, Toney offered to buy still more television sets; petitioner responded that he did not have any more sets, but he said that he had a truckload of blank video cassette tapes for sale for $2.75 per tape. J.A. 24-33; Tr. 161-170.

The second piece of "similar act" evidence was the testimony of Robert Nelson, an undercover FBI agent. Nelson testified that he began an investigation into petitioner's activities in May 1985 by posing as a buyer for an appliance store in Southgate, Michigan. On May 1, 1985, Nelson met with petitioner to discuss the purchase of video cassette movies. Petitioner offered to sell Nelson 100,000 VHS video cassette movies for $1.57 per tape, and about 800 19-inch Zenith color television sets for $200 per set. Petitioner said that he was selling the VHS video cassettes for only $157,000 because be "could not afford to have the truck sitting around." J.A. 34-37; Tr. 185-188, 204, 214.

Petitioner stated that he did not have an invoice for the merchandise, but he added that that was no problem and that he would make an invoice out to say whatever he wanted and that the invoice "would be good throughout the world" (J.A. 36-37; Tr. 188). Nelson asked whether the tapes were stolen, and petitioner, "in his words, stated that, 'Some were hot and some were not' " (J.A. 37; Tr. 188; see also J.A. 42; Tr. 204-205). When Nelson pressed petitioner on that point, petitioner said that " 'most of it is not hot' " (Tr. 205). When asked about where the tapes had come from, petitioner told Nelson that he obtained the tapes "[o]ff the docks" in Chicago (J.A. 41; Tr. 193).

Petitioner told Nelson that the delivery of the tapes and the television sets would take five days and that if Nelson needed some merchandise immediately, petitioner could deliver 28 Amana refrigerators, 2 ranges, and 40 icemakers to him for $8,000. That shipment, petitioner said, could be available within two hours. J.A. 37-38; Tr. 189-190.

Nelson received a teletype message the following morning notifying the Detroit FBI Office that a shipment of Amana appliances had been stolen. After receiving that information, Nelson contacted petitioner and told him that he was interested in purchasing the Amana appliances. Petitioner arranged to meet with Agent Nelson in a parking lot to effect the transfer of the appliances. J.A. 38-39; Tr. 190-191. As petitioner greeted Agent Nelson, he said, "Man, I hope you're not with the F.B.I." (Tr. 360). Nelson replied, "Don't mention those words around me" (*ibid.*). Petitioner then told a man who was with him to make a telephone call to arrange for the delivery of the merchandise (Tr. 360-361).

Before the appliances arrived, petitioner was arrested. Shortly thereafter, a truck containing the appliances was stopped approximately a block and a half away from the

place where petitioner and Nelson arranged to meet. Leroy Wesby, who was driving the truck at the time, was arrested. The Amana appliances were determined to be from the stolen shipment and to have a value of approximately $20,000. J.A. 34-41, 55; Tr. 185-193, 206, 216-222.

Petitioner testified at trial that he obtained the Memorex tapes, the television sets, and the Amana appliances from Leroy Wesby. He also testified that it was Wesby who arranged to provide him with the VHS movie cassettes that he offered to sell to Agent Nelson. Petitioner testified that with respect to each shipment of merchandise, he questioned Wesby as to whether it was stolen and was told that it was not. J.A. 42-63; Tr. 235-256. In fact, petitioner said when Wesby first approached him seeking his assistance in selling the truckload of black and white television sets, he and Alphonse Lewis, Jr., the owner of the Magic Rent-to-Own store, had interviewed Wesby for a day and a half, including "approximately five hours" on the first day, and that they made a number of phone calls to assure themselves that the television sets were not stolen. J.A. 44; Tr. 236-237. On cross-examination, however, petitioner stated that in the course of the two-day interview, he did not ask Wesby where he had obtained the merchandise. J.A. 63-64; Tr. 267-268.

In his closing argument, the prosecutor referred to the testimony of Toney and Nelson as support for the government's theory that petitioner knew the Memorex tapes were stolen. The prosecutor stated to the jury that "the defendant is not on trial for those situations [the television sets and the Amana appliances]" and that that evidence was produced only to show that petitioner "knew that the tapes were stolen" (Tr. 380). He explained that petitioner's

professed ignorance concerning the origins of the video cassette tapes involved in the instant indictment was simply not credible when viewed in the context of his repeated dealings with Wesby in selling large volumes of goods of suspicious origin at below market prices (*id.* at 380-388).[2]

3. The court of appeals initially reversed petitioner's conviction by a divided vote. Pet. App. D1-D16. The court concluded that the district court abused its discretion by admitting evidence of petitioner's sale of television sets to Toney. It reasoned that the evidence was unduly prejudicial because the government failed to show by clear and convincing evidence that the television sets were stolen or that petitioner knew they had been stolen. The court also held that the error of admitting that evidence was not harmless beyond a reasonable doubt. Pet. App. D6.

Judge Nelson dissented. In his view, the admission of the television set evidence was not unfairly prejudicial. He further stated that Fed. R. Evid. 404(b) permits admission of "similar act" evidence upon a showing that it is more likely than not that petitioner committed the acts and that the government satisfied this "prepondence of the evidence" standard by showing that petitioner obtained all of his goods—including some that he admitted were "hot"—from the same supplier. Even if the admission of the "similar act" evidence was error, Judge Nelson concluded that, under the harmless error test applicable to nonconstitutional errors, any error in the admission of the television set evidence was harmless. Pet. App. D9-D16.

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[2] The district court instructed the jury that the "similar act" evidence was admitted only to show petitioner's intent, plan, knowledge, or absence of mistake or accident and that the jury could not consider that evidence to show petitioner's character and to show that he acted in conformity with that character. J.A. 11; Tr. 429.

On rehearing, the court of appeals vacated its initial decision and affirmed the conviction. The court first held that Fed. R. Evid. 404(b) permits admission of "similar act" evidence under a preponderance of the evidence standard, citing the court's recent decision in *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986). It next held that the government met that standard in this case because petitioner obtained all the goods from the same supplier; he did not ascertain the source of the goods or ask to examine the supplier's bill of sale; he offered to sell the goods at prices well below their value or even, in the case of the tapes, below the cost of their manufacture. Furthermore, petitioner admitted that some of the goods were "hot." The court also concluded that the district court's limiting instruction concerning the jury's use of the "similar act" evidence minimized any possibility of prejudice. Finally, the court concluded that any error in the admission of the evidence was harmless because the verdict was not substantially affected by that evidence. Pet. App. C1-C9.

SUMMARY OF ARGUMENT

A. Rule 404(b) of the Federal Rules of Evidence states that evidence of "other crimes, wrongs, or acts" is not admissible to prove the character of a person in order to show that he acted in conformity with that character on a particular occasion. The Rule further states, however, that such "similar act" evidence is admissible for other purposes, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). The Rule contains no special restriction on "similar act" evidence that is offered for a permissible purpose; the admission of that evidence is therefore subject to the same tests as any other evidence—those set forth in Rules 401 through 403, Fed. R. Evid.

This conclusion is not only consistent with the plain language of the Rule, it also accords with the principles underlying the Federal Rules of Evidence. Rules 401 and 402 state a fundamental theme of the Rules: relevant evidence should be admissible except in certain specified instances in which the demands of particular policies require the exclusion of evidence despite its relevancy. Rule 403 expresses the general qualification that relevant evidence may be excluded if its probative value is substantially outweighed by other adjudicative policies, such as the danger of unfair prejudice or undue delay. Rules 404 through 412 then describe a number of specific situations where Congress has determined that the strong presumption in favor of admitting all relevant evidence must give way to established policies against the use of certain types of evidence for certain purposes. The structure of the Federal Rules thus makes clear that evidence offered for an impermissible purpose must be excluded, but evidence offered for a permissible purpose is subject to the normal admissibility tests set forth in Rules 401 through 403.

Petitioner's contention that a proponent of "similar act" evidence must satisfy an additional requirement of proving by "clear and convincing evidence" that the similar act occurred is at odds with the plain language, philosophy, and structure of the Federal Rules of Evidence. It is also inconsistent with the legislative history of Rule 404(b). The House and Senate Committees on the Judiciary both indicated that Rule 404(b) was intended to promote the admission of "similar act" evidence for proper purposes. They made no suggestion that evidence admissible under Rule 404(b) would be subject to special tests. Quite to the contrary, they indicated that the admission of such evidence is subject, like all other evidence, to the ordinary criteria for admissibility, such as Rule 403.

B. This Court has never sanctioned the "clear and convincing" test; instead, the Court's decisions predating the Federal Rules of Evidence follow the English common law practice and provide that "similar act" evidence, when offered for a permissible purpose, is subject to the usual relevancy requirements. Petitioner's sole support for the "clear and convincing" test derives from a view adopted by a minority of the federal courts of appeals. That minority view does not have the support of history or logic; the first federal court of appeals to employ the "clear and convincing" standard created it from a confusing amalgam of state law cases, and subsequent courts then adopted it without ever providing a persuasive justification for its use. Indeed, the test makes little sense. It excludes much evidence that obviously should be admissible, while failing to exclude some evidence that certainly should not be admitted.

There is no need to supplement the Federal Rules of Evidence with special restrictions on the admission of "similar act" evidence—whether it be petitioner's "clear and convincing" test or the Sixth Circuit's "preponderance" test—because the Rules already contain sufficient safeguards against the misuse of "similar act" evidence. First, Rule 404(b) itself provides that "similar act" evidence must be offered for some purpose other than proving the character of the accused in order to show that he acted in conformity with his character on a particular occasion. Second, the evidence must satisfy the threshold relevancy requirements of Rules 401 and 402. Third, Rule 403 specifically provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Finally, Rule 105 provides that when evidence

that is admissible for one purpose but is not admissible for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. Thus, the general admissibility standards set forth in the Federal Rules of Evidence contain ample safeguards to accompany the admission of "similar act" evidence. There is no reason to superimpose any additional test upon this comprehensive and carefully considered scheme.

C. The trial court properly admitted the government's "similar act" evidence in this case. The "similar act" evidence—consisting of testimony concerning petitioner's prior sales and marketing techniques—was part of the circumstantial evidence on which the government relied to prove that petitioner knew he was dealing in stolen merchandise. The evidence was relevant under Rules 401 and 402 because it demonstrated that petitioner's sales of stolen video cassette tapes were part of petitioner's continuing relationship with Wesby in selling large volumes of goods of suspicious origin at below market prices. Those facts, in turn, rebutted petitioner's claims that his role in the video cassette transactions was a limited one and that he had no reason to believe that the goods were stolen. The probative value of this evidence was not substantially outweighed by its prejudical effect under Rule 403 because the evidence had relatively little potential to encourage the jury to reach a result on grounds of passion, induced by the evidence of petitioner's similar acts. The possibility of any prejudice was further reduced by the trial court's limiting instruction under Rule 105. For those reasons, the district court was entirely correct in applying the Rules of Evidence to the "similar act" evidence in this case and concluding that the evidence should be admitted.

ARGUMENT

A TRIAL COURT MAY ADMIT EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS WITHOUT REQUIRING CLEAR AND CONVINCING PROOF THAT THOSE ACTS TOOK PLACE

Rule 404(b) of the Federal Rules of Evidence provides that evidence of "other crimes, wrongs, or acts" is not admissible to prove the character of a person in order to show that he acted in conformity with that character on a particular occasion. The Rule further provides, however, that such "similar act" evidence is admissible for other purposes, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). Petitioner contends that the district court misapplied Rule 404(b), because it admitted the evidence of petitioner's efforts to sell a truckload of television sets without first requiring the government to show by "clear and convincing" proof that the sets were stolen. Petitioner correctly observes that the courts of appeals have provided inconsistent—indeed, irreconcilable—direction on this matter.[3]

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[3] For example, the First Circuit admits "similar act" evidence, offered for a permissible purpose, without any special preliminary proof that the similar act took place; the evidence is admitted on the same basis as other types of relevant evidence. See *United States* v. *Currier*, No. 86-2131 (1st Cir. Dec. 10, 1987), slip op. 11-17; see also *United States* v. *D'Alora*, 585 F.2d 16, 20 (1st Cir. 1978) ("all that is needed is a showing that the evidence 'tended to logically associate appellant with that particular crime' " (citation omitted)). The Fourth, Fifth, and Eleventh Circuits seem to hold that the "similar act" evidence is admissible as long as the evidence of the similar act is sufficient to

We submit that Rule 404(b) does not impose a special burden on the proponent of "similar act" evidence[•] to prove that the similar act took place. Once the proponent establishes that the evidence is offered for a proper purpose, the evidence is admissible under the same standards that govern the admissibility of any other type of probative evidence. That result is consistent with the language, history, and policies of Rule 404(b). There is no reason for this Court to create a special restriction for "similar act" evidence, such as requiring that the similar act be established by clear and convincing evidence, since the Federal Rules of Evidence already provide adequate safeguards to ensure that "similar act" evidence will not be introduced or used for an improper purpose.

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permit the jury to find that the defendant committed the act. See *United States* v. *Martin*, 773 F.2d 579, 582 (4th Cir. 1985); *United States* v. *Beechum*, 582 F.2d 898, 914 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States* v. *Dothard*, 666 F.2d 498, 502 (11th Cir. 1982). The Second and Sixth Circuits have required the government to establish the commission of the similar act by a preponderance of the evidence. See, *e.g.*, *United States* v. *Leonard*, 524 F.2d 1076, 1090-1091 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *United States* v. *Ebens*, 800 F.2d 1422, 1432 (6th Cir. 1986); Pet. App. C4. The Seventh, Eighth, Ninth, and District of Columbia Circuits require the government to prove by clear and convincing evidence that the defendant committed the similar act. See *United States* v. *Leight*, 818 F.2d 1297, 1302 (7th Cir. 1987), cert. denied, No. 87-5636 (Nov. 16, 1987); *United States* v. *Weber*, 818 F.2d 14 (8th Cir. 1987); *United States* v. *Vaccaro*, 816 F.2d 443, 452 (9th Cir. 1987), cert. denied, No. 87-449 (Oct. 19, 1987); *United States* v. *Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985).

A. Rule 404(b) Authorizes The Admission Of Similar Act Evidence Under The Same Standard As Other Relevant Evidence, Provided That The Evidence Is Not Offered To Prove Character In Order To Show Action In Conformity Therewith

1. Rule 404(b) is quite unambiguous; it consists of two concise and straightforward sentences. The first sentence states that evidence of "crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). It accordingly imposes a blanket exclusion of "similar act" evidence when that evidence is offered for the purpose of showing that a defendant has a bad character and therefore is likely to have done the unlawful act with which he is charged.[4] The second sentence, however, makes clear the limited scope of the prohibition: evidence of similar acts is excluded *only* when it is offered for the purpose of proving the defendant's character. Where the

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[4] For shorthand purposes, we refer to the evidence that is the subject of Rule 404(b) as "similar act" evidence. That evidence is sometimes referred to as "other crimes" evidence or "bad acts" evidence. The Rule makes clear, however, that the evidence to which the Rule is addressed is not limited to evidence of criminal conduct or, for that matter, evidence of bad conduct of any sort. Rather, the Rule prohibits the introduction of any evidence that is offered for the purpose of proving a person's character in order to suggest that the person acted in accordance with that character on an occasion that is at issue at trial. See *United States* v. *Roe*, 670 F.2d 956 (11th Cir.), cert. denied, 459 U.S. 856 (1982); *United States* v. *Miller*, 573 F.2d 388 (7th Cir. 1978); *United States* v. *Evans*, 572 F.2d 455 (5th Cir.), cert. denied, 439 U.S. 870 (1978). We also refer to the person who is the subject of the evidence at issue under Rule 404(b) as the defendant, since litigation under the Rule arises most often when similar act evidence is offered against the defendant in a criminal case. Nonetheless, the Rule also applies in civil cases and to persons other than the defendant in criminal cases.

evidence is relevant for some other purpose, Rule 404(b) has no role to play in excluding it. As the Rule states, similar act evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Ibid.* That language indicates that the special treatment accorded to similar act evidence applies only when it is offered to establish propensity based on character. For all other purposes, similar act evidence falls outside the prohibition of Rule 404(b) and therefore must be assessed in the same way as any other type of evidence. Thus, if the similar act evidence is introduced for a permissible purpose, it is subject to admission under the normal tests set forth in Rules 401 through 403.

This interpretation of Rule 404(b) is not only consistent with the plain language of the Rule, but it accords with the basic philosophy underlying the Federal Rules of Evidence, and particularly the rules in Article IV, the article that deals with relevancy. Rules 401 and 402 express one of the central themes of the Rules of Evidence: that relevant evidence is admissible except in certain limited instances, in which "the demands of particular policies[ ] require the exclusion of evidence despite its relevancy." Fed. R. Evid. 402 advisory committee note.[5] Rule 403 expresses the general qualification that relevant evidence may be excluded if its probative value is substantially outweighed by other adjudicative interests, such as the danger of unfair prejudice or undue delay. Rules 404 through 412 then ad-

[5] Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Rule 402 then provides that all "relevant evidence" is admissible, except as otherwise provided by the Rules or other federal law. Fed. R. Evid. 402.

dress a number of specific problems that arise in connection with evidence relating to character (Fed. R. Evid. 404-405), habit (Fed. R. Evid. 406), subsequent remedial measures (Fed. R. Evid. 407), compromise offers (Fed. R. Evid. 408), payment of medical expenses (Fed. R. Evid. 409), plea discussions (Fed. R. Evid. 410), liability insurance (Fed. R. Evid. 411), and a rape victim's past behavior (Fed. R. Evid. 412).

Each of those rules addresses a particular topic with regard to which Congress has determined that the strong presumption in favor of admitting all relevant evidence must give way to protect other important policies. But the restrictions are narrowly drawn. Moreover, for the most part the rules in Article IV do not prohibit the admission of particular kinds of evidence, but instead distinguish between permissible and impermissible *uses* that can be made of that evidence.[6] As the Advisory Committee observed, "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Fed. R. Evid. 401 advisory committee note. The Article IV rules therefore recognize that, absent a specific prohibition, relevant evidence is admissible, and evidence

[6] See, *e.g.*, Fed. R. Evid. 407 (excluding evidence of subsequent remedial measures to show negligence, but allowing the use of such evidence "for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment"); Fed. R. Evid. 408 (excluding evidence of compromise offers to show liability, but allowing the use of such evidence "for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution"); Fed. R. Evid. 411 (excluding evidence of liability insurance to show negligence, but allowing the use of such evidence "for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness").

that is inadmissible for one purpose may nonetheless be admissible for another.

Rule 404 is consistent with that theme. As the Advisory Committee explained, the Rule reflects a judgment that the circumstantial use of character evidence raises special problems of unfair prejudice and therefore justifies a restriction on the use of evidence for that purpose. See Fed. R. Evid 404(a) advisory committee note. Rule 404(b), which "deals with a specialized but important application of the general rule excluding circumstantial use of character evidence," prohibits the use of similar act evidence "to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it." Fed. R. Evid. 404(b) advisory committee note. The same evidence, however, may properly "be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded." *Ibid.* Thus, similar act evidence, provided that it is not offered for an impermissible purpose, is admissible under the same standards as other relevant evidence.

2. Petitioner contends that the government should be required to meet an additional test, nowhere stated in the Federal Rules, before similar act evidence is admitted. He argues that the government should be required to show, through "clear and convincing" proof, that the defendant committed the similar act in question. See Pet. Br. 15.

Petitioner's proposed construction of Rule 404(b) is at odds with the plain language of the Rule. The Rule contains no hint whatever that the proponent of properly relevant similar act evidence must make a special preliminary showing—whether under a "clear and convincing" standard or a "preponderance" standard—that the similar act took place. As this Court has noted in a closely analogous

context, the absence of any textual support for petitioner's construction should be "the end of the matter." *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), slip op. 6.

The Federal Rules of Evidence were not intended as a random collection of a few general principles of evidence law to be supplemented by the courts as they saw fit. Instead, the rules were designed to be a comprehensive set of principles governing the admissibility of evidence in federal trials. Where the rules intended those principles to be developed by the courts or derived from other sources, the rules expressly so provided. See Fed. R. Evid. 501 (privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience"); Fed. R. Evid. 302 ("the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law"); Fed. R. Evid. 601 ("with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law"). The rules governing relevancy, however, contain no such indication that they are meant to be modified or supplemented by court decision. Thus, the absence in Rule 404(b) of any special preliminary test for admitting relevant similar act evidence demonstrates that no such test was intended.

3. When a Federal Rule of Evidence, such as Rule 404(b), provides clear guidance as to its application, it is ordinarily unnecessary to look to legislative history to confirm its meaning. See *Bourjaily,* slip op. 6. In this case, the legislative history is entirely consistent with the simple and straightforward application of the Rule that its language suggests; if there were any doubt concerning the meaning of Rule 404(b), the legislative history would put that doubt to rest.

The legislative history of Rule 404(b) contains no hint that similar act evidence is subject to special heightened proof requirements such as a "clear and convincing evidence" standard, or even a "preponderance of the evidence" standard. To the contrary, the legislative history indicates that Congress's intention was that similar act evidence, if not offered to prove propensity, should be subject to the normal criteria of admissibility set forth elsewhere in the Federal Rules.

The history of the Federal Rules of Evidence is, of course, familiar. In 1961, the Judicial Conference initiated a study of the need for uniform federal rules of evidence. See *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts,* 30 F.R.D. 73 (1962) [hereinafter *Preliminary Report*]. Shortly thereafter, the Judicial Conference appointed the Advisory Committee on the Rules of Evidence to develop appropriate rules. From 1969 to 1971, the Advisory Committee formulated, circulated, and revised various drafts. See, *e.g., Preliminary Draft of Proposed Rules of Evidence,* 46 F.R.D. 183 (1969); *Revised Draft of Proposed Rules of Evidence,* 51 F.R.D. 315 (1971). On November 20, 1972, this Court approved the Advisory Committee's final version of the Federal Rules of Evidence. See 56 F.R.D. 184 (1973). The Rules were transmitted to Congress, where they were reviewed, amended, and ultimately enacted into law. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

The Advisory Committee quite consciously avoided creating any sort of "mechanical solution" for admitting similar act evidence that is relevant for some purpose other than proving character. Fed. R. Evid. 404(b) advisory committee note. Rather, it indicated that a trial court should employ the standard criteria used to determine the admissibility of relevant evidence, *i.e.*, "whether the

danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Ibid.*

The House Committee on the Judiciary expressed no disagreement with this assessment, but made a slight change in the language of Rule 404(b) to emphasize that the Rule was intended to authorize the admission of similar act evidence, rather than to restrict its use. The Committee explained:

> The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

H.R. Rep. 93-650, 93d Cong., 1st Sess. 7 (1973). The House Committee's modification of the Rule to place "greater emphasis on admissibility" is fully consistent with the Advisory Committee's view that properly relevant similar act evidence would be admitted on the same basis as other relevant evidence.

The Senate Committee on the Judiciary confirmed that understanding in language that could not have been clearer. The Senate Report specifically noted that the use of the word "may" in the rule was "not intended to confer any arbitrary discretion on the trial judge" (S. Rep. 93-1277, 93d Cong., 2d Sess. 24 (1974)). Rather, the Senate Report stated, with respect to permissible uses of similar act evidence, "the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of time" (*id.* at 25).

In spite of this clear indication of congressional intent to prevent additional barriers to admissibility from creeping into Rule 404(b) by court decision, petitioner argues that the legislative history is contrary to the position we propose. He bases his argument on an observation made by Department of Justice representatives in response to the 1971 draft of Rule 404(b). That draft used the phrase "may * * * be admissible" in referring to the admissibility of similar act evidence for purposes for which it was relevant (see 51 F.R.D. at 346). The Justice Department and the United States Attorney for the District of Columbia both objected to the Advisory Committee's use of that phrase. They argued that the use of that language might suggest that the trial court could exercise uncabined discretion in excluding similar act evidence. See 117 Cong. Rec. 33650, 33658 (1971). The Department explained that similar act evidence, relevant for purposes other than establishing character, should be excludable "[o]nly if the probative value of these facts is substantially outweighed by the danger of unfair prejudice" (*id.* at 33650).

The version of the Rule that was proposed by this Court used a slightly different formulation: it stated that "[t]his subdivision does not exclude [similar act] evidence" when offered for proper purposes. 56 F.R.D. at 219. Congress, however, returned to the phrase "may * * * be admissible," and that phrase was retained in the version of the Rule that was ultimately enacted. Petitioner argues that Congress's return to language about which the Department had expressed concern three years earlier constitutes proof that Congress was rejecting the premise on which the Department based its objection—that similar act evidence should generally be admissible, except where it is offered solely to establish propensity.

Petitioner's suggestion that a return to earlier language was meant as a silent rejection of the Department's posi-

tion taken three years earlier would be quite strained even in the absence of other indications of why Congress made the change in the language of the Rule. In fact, however, petitioner's argument ignores what the pertinent congressional committees said was the purpose of the change. The statements in both the House and Senate reports, quoted above, make it clear that the change was made because the committees believed the "may * * * be admissible" formulation put *more* emphasis on admissibility rather than less. The statements in the 1973 and 1974 committee reports, which take exactly the same position with regard to the admissibility of similar act evidence that the Department of Justice had urged three years earlier, entirely dispose of petitioner's contention that the return to the language of the 1971 draft was intended as a silent rejection of the position that had been urged by the Department at that time.

Thus, the legislative history of Rule 404(b) strongly supports the view that similar act evidence, offered for a permissible purpose, is admissible on the same basis as other relevant evidence. It offers no support whatsoever for the proposition that the proponent of such evidence must satisfy some unstated preliminary test—whether conducted under a "clear and convincing evidence" standard or a "preponderance of the evidence" standard—that the defendant committed the similar act.

B. The Courts Should Not Create a Special Test for the Admission of Similar Act Evidence

1. Petitioner's legal authority for the imposition of a special "clear and convincing" test on similar act evidence derives from a minority view among the court of appeals (see note 3, *supra*) that predates the enactment Rule 404(b). Even if that test had anything to commend it by

way of historical foundation and practical justification, it would not be appropriate for this Court to embrace it in light of the clearly contrary approach adopted by Congress when it enacted Rule 404(b). In fact, however, the "clear and convincing" test, which is followed in the Seventh, Eighth, Ninth, and D.C. Circuits (see note 3, *supra*), has both a dubious pedigree and virtually nothing by way of sound policy to recommend it.

Petitioner's "clear and convincing" test certainly finds no support in this Court's treatment of similar act evidence. To the contrary, the Court's decisions prior to the adoption of the Federal Rules of Evidence support the interpretation of the Rule that we are proposing: those decisions are consistent with the view that similar act evidence may not be used simply to demonstrate criminal propensity, but that it may be admissible whenever it is relevant for other purposes. See, *e.g.*, *Lisenba* v. *California*, 314 U.S. 219, 227 (1941) (upholding admission of testimony "on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, or system"); *Hall* v. *United States*, 150 U.S. 76, 81 (1893) (excluding evidence "intended to persuade the jury that the defendant had murdered one man in Mississippi, and therefore should be convicted of murdering another man in Arkansas"); *Moore* v. *United States*, 150 U.S. 57, 61 (1893) (upholding admission of evidence of a previous murder that suggested defendant's motive); *Boyd* v. *United States*, 142 U.S. 450, 458 (1892) (excluding evidence that the defendant had committed previous robberies where the evidence "afforded no legal presumption or inference as to the particular crime charged"). In each instance, the Court treated the issue as one of simple relevance; the Court neither suggested nor sanctioned the use of special standards, such as the "clear and convincing" test, for the admission of similar act evidence.

In that respect, the Court followed the traditional English practice. See Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988 (1938). At common law, as Professor Stone observed, "there never did exist any rule of evidence in England excluding proof of other offences of the accused where such proof was relevant to a fact in issue. All that there was to be found was a very narrow rule excluding proof where the relevance was merely to the evil disposition of the accused. Consequently the admission of similar facts where relevant to guilty knowledge in forgery and receiving cases was not, nor was it regarded at the time, as in any sense a derogation from the rule of exclusion. Such evidence was admitted not under exceptions to the rule, but as wholly outside its scope " Stone, *supra*, 51 Harv. L. Rev. at 990-991. See also Stone, *The Rule of Exclusion of Similar Act Evidence: England*, 46 Harv. L. Rev. 954, 985 (1933) ("the rule of exclusion of similar facts is and always has been very narrow").

Justice Story's reasoning in *Wood* v. *United States*, 41 U.S. (16 Pet.) 342 (1842), is particularly instructive, as it reflects adherence to the common law rule treating similar act evidence as raising a question of simple relevance, not as falling into a special category of disfavored proof. In the *Wood* case, the Court upheld the admission of similar acts to establish an intent to defraud, stating (*id.* at 360):

> The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it

> be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty.

The court made no mention of a "clear and convincing" test or any other preliminary barrier to admission of similar act evidence. Instead, it treated the question of admissibility as one of simple relevance, stating, "at all events, if the proof be pertinent and competent, the admission of it cannot be matter of error" (*id.* at 361).

The few cases in which this Court has dealt with the issue thus show that this Court has always addressed the admissibility of similar act evidence in an uncomplicated and sensible manner. In the first half of this century, however, lower courts followed an inconsistent pattern in dealing with similar act evidence and became intractably mired in a complex set of court-made rules. See Stone, *supra*, 51 Harv. L. Rev. at 988.[7] The "clear and convincing" test emerged as a tuft in the "vast morass" (*ibid.*) of shifting and unsettled lower court authority.

The Eighth Circuit was the first federal court of appeals to employ the "clear and convincing" test. It reversed a narcotics conviction in *Paris* v. *United States*, 260 F. 529 (8th Cir. 1919), on the ground that the trial judge erred by admitting evidence that the police had arrested the defendant one year earlier and had found morphine bottles in his

[7] Early Twentieth Century commentators despaired that the state courts' common law rules concerning admission of similar act evidence had grown so confused that " 'it is hopeless to attempt to reconcile the precedents under the various heads'." Stone, *supra*, 51 Harv. L. Rev. at 988 (quoting 1 J. Wigmore, *Evidence* 616 (2d ed. 1923)). Dean Wigmore, a vocal critic of the "spirit of empiric eclecticism" that dominated the law of evidence during this period (1 J. Wigmore, *Evidence* § 8, at 612-613 (Tillers rev. 1983)), believed that the inconsistency among the cases reflected, in part, the divergent views that judges maintained as to the relevance of similar act evidence. See 2 J. Wigmore, *supra* § 302, at 246-247 (Chadbourn rev. 1979); see also Stone, *supra*, 51 Harv. L. Rev. at 988-989. Professor Stone concluded that the case law reflected a conflict between "the original rule which only excluded similar fact evidence when relevant merely to disposition, and a much broader spurious rule excluding all similar facts except those falling within a few closed categories settled by earlier decisions." 51 Harv. L. Rev. at 989; see *id.* at 1033-1037.

possession. The court stated that similar act evidence may be admissible in some specific instances, but added, "it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible." 260 F. at 531. It is difficult to resist the conclusion that in spite of the numerous citations offered to support that proposition, the court in *Paris* did not apply the rule, but rather simply made it up.[8] Yet once the

[8] *Paris* relied on a number of cases to support its position, but none of them referred to a "clear and convincing evidence" standard. Indeed, those cases reflect the general confusion among the lower courts. *Baxter* v. *State*, 91 Ohio St. 167, 110 N.E. 456 (1914), states that "vague and uncertain" evidence should never be admitted (*id.* at 172, 110 N.E. at 458), and later adds, "Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses" (*id.* at 173, 110 N.E. at 458). *State* v. *Hyde*, 234 Mo. 200, 136 S.W. 316 (1911), indicates that there must be "substantial testimony" to support the admission of similar act evidence (*id.* at 231, 136 S.W. at 324). *State* v. *Lapage*, 57 N.H. 245 (1876), states, "it will be found that the courts have always professed to put the admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other" (*id.* at 295). *People* v. *Sharp*, 107

"clear and convincing" language had gained a foothold in *Paris*, it won unquestioning acceptance from several courts. Only four years after *Paris*, the Eighth Circuit cited the "clear and convincing" test as if it had always been the law. See *Gart* v. *United States*, 294 F. 66, 67 (8th Cir. 1923) ("Where a case falls within the exception, the proof must be clear and convincing."). That language eventually found its way into decisions of the Fifth, Seventh, Ninth, and District of Columbia Circuits.[9]

The "clear and convincing" test has never earned acceptance by a majority of the courts of appeals; indeed, the courts that adopted the "clear and convincing" test have never articulated a persuasive justification for its use. Those courts suggest, of course, that the test protects the defendant from unfair surprise, confusion of issues, and undue prejudice. See, *e.g.*, *Paris*, 260 F. at 531. But it does so in a clumsy and haphazard way. It excludes much evidence that obviously should be admissible, and it fails to exclude some evidence that clearly should not be admitted.

N.Y. 427, 14 N.E. 319 (1887), quotes *Lapage* with approval (*id.* at 469, 14 N.E. at 345). *Fish* v. *United States*, 215 F. 544 (1st Cir. 1914), came perhaps the closest to adopting a "clear and convincing evidence" standard when it stated that similar act evidence should be admitted "if at all, only in a plain case" (*id.* at 549), but for that proposition the court cited *Sharp* and *Lapage*, which offer absolutely no support for a "plain case" or "clear and convincing evidence" standard.

[9] The Fifth and Ninth Circuits both expressly followed the Eighth Circuit's *Paris* decision. See *MacLafferty* v. *United States*, 77 F.2d 715, 720 (9th Cir. 1935); *Fabacher* v. *United States*, 20 F.2d 736, 738 (5th Cir. 1927). The D.C. Circuit adopted the "clear and convincing" test in a footnote some 35 years later, citing only a state law decision. See *United States* v. *Bussey*, 432 F.2d 1330, 1335 n.23 (D.C. Cir. 1970). The Seventh Circuit adopted that standard in 1974 without the citation of any authority at all. *United States* v. *Ostrowsky*, 501 F.2d 318, 321 (7th Cir. 1974).

For example, the "clear and convincing" test would exclude proof of a series of similar acts where the series as a whole is highly probative, but where the evidence is not compelling with regard to any single act. As this Court recently explained, the "individual pieces of evidence insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily*, slip op. 7. Similar act evidence, offered for a permissible purpose, is often highly probative for precisely that reason. A series of similar acts can establish a pattern or practice that demonstrates knowledge, intent, or absence of mistake or accident. To exclude the entire series because there is no compelling evidence with respect to any single act would be at odds with the language and purpose of Rule 404(b).

Consider, for example, the following hypothetical case: A defendant is arrested at a neighborhood grocery store in the act of passing a counterfeit $50 bill. The defendant claims that he did now know that the bill was counterfeit, and that he must have come into possession of the bill innocently, by receiving it in change for another purchase. Further investigation reveals that on the day of his arrest, the defendant had visited four other neighborhood stores, he had made a small purchase at each store with a $50 bill, and the cash register of each store was later found to contain a counterfeit $50 bill. Under these circumstances, the government may not be able to establish—under a "clear and convincing" test or even under a "preponderance" test—that the defendant made his purchases with the same counterfeit $50 bills that were later found in the four cash registers. Nonetheless, this similar act evidence, in the aggregate, provides a compelling circumstantial basis for inferring that the defendant knew that the $50 bill he attempted to spend in the grocery store was counterfeit,

since it allows (if not compels) the jury to conclude that the defendant was making a series of unusual purchases in order to obtain large amounts of good currency in exchange for a set of counterfeit bills. We do not believe that Rule 404(b) should be construed in a way that would prevent a jury from considering that type of highly probative evidence.

Another defect in the "clear and convincing" test is that it focuses on the strength of the proof showing that the similar act occurred, rather than on the probative force of the act in the context of the case. It therefore favors evidence, such as a conviction, that conclusively establishes that a prior crime occurred, without questioning whether that crime has any significant probative value for purposes of the case at issue.

This unresponsive feature of the "clear and convincing" test is well illustrated by the *Paris* case, the federal decision that apparently was the first to embrace the test. The evidence in that case, a prior narcotics violation, was apparently established quite conclusively. The problem with the evidence therefore had nothing to do with any lack of confidence that the similar act occurred. Instead, the problem with the evidence was that it was minimally probative and highly prejudicial. That evidence therefore should have been excluded under conventional relevance analysis. Thus, in a case such a *Paris*, the "clear and convincing" test adds nothing to the analysis, and in fact it distracts the attention of the court from the central relevance inquiry that should govern whether similar act evidence is admissible.

2. The Federal Rules of Evidence were designed to establish uniform rules in place of common law practices that were "archaic, paradoxical, and full of compromises and compensations by which an irrational advantage to

one side is offset by a poorly reasoned counterprivilege to the other" (*Michelson* v. *United States*, 335 U.S. 469, 486 (1948)). See *Preliminary Report*, 30 F.R.D. at 108-110. Those rules, we submit, were intended to supplant the "morass" surrounding the admission of similar act evidence with a sensible uniform standard. The drafters of the Federal Rules of Evidence quite clearly intended to overrule questionable evidentiary practices, such as the "clear and convincing" test, which lacked both historical and logical support, and perpetuated nonuniformity in the federal system. The best evidence of this intent is, of course, the fact that the test was not incorporated into the Federal Rules.

The drafters would no doubt be surprised to find that Rule 404(b) did not supplant those past practices. Indeed, the Advisory Committee's Reporter, Professor Cleary, specifically criticized the Fifth Circuit for continuing to apply its "clear and convincing" test following the adoption of the Federal Rules of Evidence. See Cleary, *Preliminary Notes on Reading the Federal Rules of Evidence*, 57 Neb. L. Rev. 908, 917 (1978).[10] Professor Cleary observed that the "court decided to continue the former rule of the circuit which required that other crimes in intent cases be proved by clear and convincing evidence, although no such requirement is found in Rule 404(b)" (57 Neb. L. Rev. at 917). He explained that courts may make "acceptable extensions by analogy within the purpose of a rule" (*ibid.*), but the Fifth Circuit's decision amounted to "the amendment of a rule by engrafting a further requirement" (*ibid.*). "The result was to frustrate application of

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[10] Professor Cleary referred to *United States* v. *Beechum*, 555 F.2d 487 (5th Cir. 1977). The court of appeals, sitting en banc, subsequently overruled that decision. See *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979).

the Rule, to destroy uniformity of interpretation, and to violate the accepted principles of statutory construction" (*ibid.*).[11]

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[11] Professor Cleary is not alone in his criticism of the test. For example, Weinstein and Berger state:

> No rigid standard is particularly helpful. If the evidence meets the test of [Rules] 401 and 404, it may still be highly prejudicial under 403. Less prejudicial and more probative evidence suggests a lower burden of proof. Contrariwise, if the evidence may tend to be highly prejudicial, the court is entitled to require a higher burden of proof. No strictly mechanical test provided by the appellate courts will help the trial judge much in sensitively drawing a fair balance.

2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[10], at 404-73 (1986) (footnotes omitted). Imwinkelried observes:

> Since the adoption of the Federal Rules of Evidence, the judicial support for the clear and convincing standard has weakened. The proponents argue that the courts may continue to apply the prior standard as a gloss on Federal Rule of Evidence 403. There is a strong contrary argument. No Federal Rule expressly codifies a requirement for clear and convincing proof. Moreover, Federal Rule of Evidence 402 reflects a bias for the admission of relevant evidence and against the erection of new exclusionary barriers.

E. Imwinkelried, *Uncharged Misconduct Evidence* § 2:08, at 21 (1984) (footnotes omitted). Saltzburg and Redden criticize the "clear and convincing" test on the ground that it requires the judge to make credibility determinations, adding:

> For this reason, we believe that it is preferable for the Trial Judge to be aware of the prejudicial potential of other crimes evidence, to assure that it is needed in a case, to inquire whether less prejudicial evidence is available to prove a point, and to carefully make a balancing decision using the standard we have suggested under Rule 403. This is the real protection in the long run for all litigants.

S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 185 (4th ed. 1986).

3. Because the Federal Rules of Evidence contain sufficient safeguards against the misuse of similar act evidence, there is no need to engraft onto the rules a special restriction on the admission of such evidence—whether it be petitioner's "clear and convincing" test or the Sixth Circuit's "preponderance" test. First, Rule 404(b) itself provides that similar act evidence must be offered for some purpose other than showing "the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). The burden is therefore on the proponent of similar act evidence to identify a permissible purpose to be served by the evidence and to show how the evidence bears on a material issue in the case. Second, even after overcoming the "improper purpose" objection, the proponent must satisfy the relevancy requirements of Rules 401 and 402. In particular, the similar act evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

The general admissibility standards in the Federal Rules of Evidence provide other limitations, in addition to relevancy requirements, that prevent the jury from misusing logically relevant evidence. The most important limitation, of course, is Rule 403, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. That Rule vests the trial judge with the power to consider firsthand, and in the context of a particular trial situation, the potential prejudicial effect of similar act evidence. See *United States* v. *Abel*, 469 U.S. 45, 53-54

(1984). The Rule 403 standard is vastly preferable to a "clear and convincing" or "preponderance" test because it permits the trial judge to balance the competing interests that favor admission or exclusion of the evidence. The "clear and convincing" and "preponderance" tests—which examine only the strength of the proof of the similar act—take into account only half of the equation. Rule 403, by contrast, explicitly addresses the competing considerations by directing the courts to weigh the probative value of similar act evidence against the possibility that the evidence will result in unfair prejudice.

In addition to the safeguards found in Rules 401 through 403, Rule 105 further provides that, when "evidence which is admissible * * * for one purpose but not admissible * * * for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly" (Fed. R. Evid. 105). That Rule provides further protection against the possibility that jurors might misuse similar act evidence. The deeply rooted respect for jury trials rests in part on the reasonable belief that "jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985). That belief is founded on a "pragmatic" presumption (*Richardson* v. *Marsh*, No. 85-1433 (Apr. 27, 1987), slip op. 10). But the presumption, which has been applied "in many varying contexts" (*id.* at 6 (citing cases)), is particularly sensible and trustworthy when accompanied by a trial court's individualized determination, under Rule 403, that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

We note that the offer of similar act evidence on occasion raises an issue of "conditional" relevance and calls for

the application of Rule 104(b). That Rule provides that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Fed. R. Evid. 104(b). For example, in the hypothetical counterfeit currency case that we described above, the defendant might object to the similar act evidence by arguing that the relevance of the evidence depends on the condition that he was the person who passed the counterfeit bills in the other four stores. If the government is unable to provide a basis from which the jury could conclude that the defendant was the person in the other stores, the court may exclude the evidence as irrelevant. However, this result follows directly from the relevancy requirements set forth in Rules 401 and 402, and not from any considerations unique to similar act evidence. We believe that the Fourth, Fifth, and Eleventh Circuits, which provide that similar act evidence is admissible if there is sufficient evidence to permit the jury to find that the defendant committed the act in question (see note 3, *supra*), are in fact responding to the particular problem of conditional relevance.

In sum, the general admissibility standards set forth in the Federal Rules of Evidence contain ample safeguards to accompany the admission of similar act evidence. Those standards ensure that the evidence is relevant for a permissible purpose, that its probative value is balanced against the possibility of unfair prejudice, and that the jury fully understands the purposes for which the evidence has been admitted and the purposes for which it may not be used. There is no reason to superimpose any additional test upon this comprehensive and carefully considered scheme.

C. The Trial Court Properly Admitted the Government's Similar Act Evidence in This Case

Petitioner was charged with the possession and sale of stolen video cassette tapes. He admitted that he possessed and sold the tapes, but he defended by claiming that he did not know the tapes were stolen; thus, the central, if not the sole, factual issue in dispute at trial was petitioner's knowledge. As frequently occurs in cases involving stolen goods, the government needed to rely on circumstantial evidence to show that the possession and sale were "knowing" (18 U.S.C. (& Supp. IV) 659, 2315). The similar act evidence proffered by the government was part of the circumstantial evidence on which the government sought to rely to prove petitioner's guilty knowledge. See J.A. 5-11; Tr. 4-10.

The government's similar act evidence consisted of testimony from Paul Toney, the record store owner, and Robert Nelson, the undercover FBI agent, concerning petitioner's past dealings in goods of suspicious origin. That testimony was clearly relevant to whether petitioner knew that the video casssette tapes that he had obtained from Wesby were stolen. Toney's testimony described petitioner's dealings in a truckload quantity of unusually low-priced television sets obtained shortly before petitioner received the stolen video cassette tapes. Nelson's testimony described petitioner's dealings in a large quantity of unusually low-priced kitchen appliances (some of which petitioner admitted were stolen), which petitioner obtained from Wesby shortly after petitioner's receipt of the video cassette tapes.

Petitioner does not challenge the admission of Nelson's testimony concerning the kitchen appliances, but he does object to the admission of Toney's testimony concerning the television sets on the ground that the government had insufficient proof that the television sets were stolen.

There are two answers to that claim. First, the fact that petitioner was offering the television sets for an extremely low price—$28 apiece—and the fact that he was marketing them in a surreptitious fashion—by trying to find buyers in a barroom—is sufficient to permit the jury to conclude both that the television sets were stolen and that petitioner knew they were stolen. Second, even apart from whether the television sets were stolen, Toney's testimony was relevant because it reflected something significant about petitioner's role in selling the merchandise he received during the spring of 1985. Viewed in isolation, the evidence regarding the Memorex tape sales might suggest that petitioner had only a fleeting contact with goods of a suspicious origin and thus may have overlooked the possibility that they were stolen. Indeed, at trial petitioner suggested through his testimony that he had only a limited role in selling the Memorex tapes, and that he had helped sell them simply as an incidental accommodation to Wesby. That testimony was obviously intended to suggest that because petitioner's involvement in the transaction was limited, he had no occasion to look too closely into the question whether the tapes were stolen.

Toney's testimony helped rebut any suggestion that petitioner played only a limited, one-time role in selling merchandise for Wesby. Rather, it made it clear that petitioner was engaged in selling goods of suspicious origin throughout the State of Michigan, over a several-month period of time, and that he played a very active role in promoting the sales effort. Thus, whether or not the television sets were shown to be stolen, Toney's testimony was relevant because it revealed the ongoing nature of petitioner's activity in the "informal" merchandising of appliances and videotapes. The inference to be drawn from that evidence, in turn, is that if petitioner was deeply involved in the sales

effort over an extended period of time, it was more likely that he was aware of the nature and origin of the merchandise he was selling.[12]

Petitioner did not raise a Rule 403 objection at trial that the probative value of Toney's testimony was substantially outweighed by the danger of unfair prejudice. In any event, such an objection would have been unavailing. On the one hand, Toney's testimony had substantial probative value for the purpose of showing that petitioner was engaged in extensive dealings in goods of suspicious origin and therefore was likely to be aware of the nature of the goods he was handling. On the other hand, the testimony did not have undue potential for unfair prejudice. Although that evidence gave rise to the inference that petitioner was involved in other acts of "fencing" stolen goods, the similar act evidence was not particularly prejudicial, as it did not involve conduct that was more heinous than the conduct with which petitioner was charged. Moreover, the television set evidence was less prejudicial than the testimony from Agent Nelson, the admissibility of which petitioner does not contest. And the offense of possession of stolen goods is not one that is likely to inflame the passions of a jury. Thus, Toney's testimony did not significantly increase the risk that the jury would be induced to reach its verdict based on passion, stemming from the evidence of petitioner's similar acts.

[12] Because Toney's testimony was admissible without regard to whether the television sets were stolen, it was not necessary for the court to make a determination under Rule 104(b) that there was sufficient evidence of the stolen nature of the television sets to permit the jury to consider that evidence. Even if the relevance of Toney's testimony had been premised on the stolen nature of the television sets, Rule 104(b) would have been satisfied, as there was sufficient evidence at trial to permit the jury to infer that the television sets were stolen.

The possibility of prejudice was further reduced by the trial court's instruction to the jury that Toney's testimony "is admitted only as it may bear on defendant's intent, plan, knowledge, or absence of mistake or accident" (J.A. 11; Tr. 429). The government itself made the same point in its closing argument by stating to the jury that "the defendant is not on trial for those situations" and that the evidence was produced only to show that petitioner "knew that the tapes were stolen" (Tr. 380).

In sum, the district court handled the admission of the similar act evidence in this case flawlessly. It admitted the evidence for a proper purpose; the evidence was relevant to a material fact in issue; the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice; and the court gave a proper limiting instruction to the jury. Nothing more was required by the Federal Rules of Evidence, and no additional procedure should be imposed by means of a court-made rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY

BRIEF

No. 87-6

In The
Supreme Court of the United States
October Term, 1987

GUY RUFUS HUDDLESTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

A TRIAL COURT MAY NOT ADMIT EVIDENCE OF A SIMILAR ACT WITHOUT FIRST DETERMINING THAT THE PRIOR BAD ACT TOOK PLACE AND THAT THE DEFENDANT COMMITTED IT.

The government argues that Rule 404(b) of the Federal Rule of Evidence imposes no prerequisite burden on the proponent of similar acts evidence to prove that the similar act took place or that the opposing party committed it. Petitioner sees the government as arguing that the trial court should engage in only a two step analysis to determine whether similar acts evidence is admissible. First, the proponent of the evidence must show that it is being offered for a proper purpose.[1] If this is shown, then the court must weigh the probative value of

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[1] A "proper purpose" is that it is being offered to show motive, intent, knowledge, etc., and that the purpose for which it is being offered is at issue in the trial.

such evidence against the prejudicial effect on the defendant under Fed. R. Evid. 403. According to the government, no other tests should apply. The proponent should not have to first prove to the court that the prior acts took place or that the opposing party committed them, before the court ever reaches the two step analysis. The government argues against both a clear and convincing prerequisite test, and a preponderance of the evidence test, contending that it is enough to show that there is a basis for finding that the bad act took place and that the defendant committed it.

The government contends that its position is supported by: 1) the plain language of Rule 404(b); 2) a prerequisite test is nowhere found in the Federal Rules; 3) Congressional history; 4) there is no support for a prerequisite test in this Court's review of similar act evi-

dence; and 5) the First Circuit Court of Appeals has adopted its position. See United States v D'Alora, 585 F.2d 16, 20 (1st Cir. 1978). Finally, it contends that the prerequisite tests were judicially created; do more harm than good by excluding some evidence that obviously should be admitted, and failing to exclude other evidence that should not be admitted; and are not needed in the face of the protections of the probative/prejudice balancing test of Rule 403.

Petitioner submits that the government's contention is patently wrong because the prerequisite test is explicitly contained in the Fed. R. Evid. 104. The government practically ignores the presence of Rule 104. The rule mandates that the trial judge determine that the prior bad act took place and that the defendant committed it before the court performs a probative/prejudice balancing.

This conclusion is consistent with the opinions of every Circuit Court of Appeals which have been squarely faced with the issue.[2] Even the First Circuit no longer follows the "any basis" test proposed by the government. United States v Ingraham, 832 F.2d 229, 23'-237 ('st Cir. 1987.) The Supreme Court cases cited by the government in support of its contention are not helpful. Res. Br. 24-26. In the cases decided by this Court involving a review of similar acts evidence, this

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2 As has been explained in Petitioner's Brief on the Merits, the Seventh, Eighth, Ninth, and D.C. Circuits require that the bad act be shown by clear and convincing evidence. See Pet. Br. 22-23; 26-27, n. 19. These circuits have either found this prerequisite test to be part of the probative/prejudice balancing , or it is implicit in Rule 104(a). See Pet. Br. 39, n. 25. The Second, Fourth, Fifth, Sixth, Eventh, and now the First Circuit require that the bad act be proved to the trial court by at least a preponderance of the evidence, as a "conditional fact" under Rule 104(b), before the probative/ prejudice balancing takes place. See Pet. Br. 25.

Court has never been faced with a prerequisite test question prior to this case.

Neither the "clear and convincing" prerequisite test, nor the "preponderance of the evidence" prerequisite test exclude evidence which should be admitted, nor fail to exclude evidence which should be excluded. They shield the jury from hearing highly prejudicial similar bad act testimcny unless the court first finds t the bad act occurred and the defendant committed it. Stated another way, unless the proponent can meet the prerequisite test, then it is not necessary to engage in a probative/prejudice balancing, because the evidence has no probative value.

On the other hand, the government's "any basis test" combined with the type of Rule 403 balancing espoused by the government, provides almost no protection to the defendant. The government argues that the

bad act is admitted unless its prejudicial effect on the defendant substantially outweighs its probative value. Thus, a straight Rule 403 balancing is weighted against the defendant. Once the bad act is pidgeonholed into one of the 404(b) exceptions, it will in most cases be admitted, except where the bad act is particularly heinous, and therefore, especially prejudicial. Under the government's "protection", the jury can hear about the bad act, even if the act did not occur and even if the defendant did not commit it.[3]

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[3] Petitioner admits that a probative/-prejudice balancing can offer some protection to a defendant, but only if it is applied differently than under Rule 403. As was explained extensively in Petitioner's Brief on the Merits, the language of Rule 404(b) and the Advisory Committee Notes nowhere say that the prejudicial effect must substantially outweigh the probative value. Indeed, the Notes indicate only that the court should consider the factors listed in Rule 403, and apply

(Continued on following page)

A. RULE 104 REQUIRES THAT THE TRIAL COURT FIND THAT THE SIMILAR ACT OCCURRED AND THAT THE DEFENDANT COMMITTED IT AS ONE OF THE PREREQUISITES TO ADMITTING SIMILAR ACTS EVIDENCE.

Fed. R. Evid. 104 provides in pertinent part:

> Preliminary Questions
>
> (a) Questions of admissibility generally. Preliminary questions

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(Continued from previous page)

them, but that "no mechanical solution is offered." See Pet. Br. 30. Some Circuit Courts of Appeals apply a straight Rule 403 balancing; other require that the proponent show that the probative value of the bad acts evidence outweighs the prejudice to the defendant.

As a corollary, Weinstein combines the prerequisite test, with the probative/prejudice balancing test (arguably like the Seventh, Eighth, Ninth, and D.C. Circuits). As the government recognizes in its brief, Weinstein espouses a "sliding" scale of proof--i.e., the more prejudicial the evidence, the higher should be the burden of proof on the proponent to show that the bad act occurred, and the defendant committed it. 2 J. Weinstein & M. Berger, Weinstein's Evidence 404[10], at 404-73 (1986) (footnotes omitted). See Res. Br. 32, n. 11. For an excellent article proposing such a sliding scale, see Sharpe, Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 59 Notre Dame L.Rev. 558 (1984).

concerning . . . the admissibiiity of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

In its Petition for Rehearing in the Sixth Circuit, the government argued that the court of appeals should follow Judge Nelson's dissent in the initial decision here (Pet. App. D13-D15), and adopt a preponderance of the evidence standard pursuant to the standard adopted in United States v Beechum, 582 F.2d 898 (5th Cir.

1978) (en banc), cert. denied, 440 U.S. 920 (1978); and United States v Leonard, 524 F.2d 1076 (2nd Cir. 1975), cert. denied, 425 U.S. 958 (1976). Res. Pet. Reh. 6-9. Beechum relied specifically on Rule 104(b) in so holding, finding that the government must convince the trial judge that the defendant committed the extrinsic offense, not by clear and convincing evidence, but by evidence sufficient for the jury to find the preliminary fact to exist, before any probative/prejudice balancing is done. Beechum, at 910 n. 13 & 913. Judge Nelson in reversing the decision on rehearing indicated that he viewed the Beechum 104(b) standard as fully consistent with the Leonard precedent and with the preponderance standard. (Pet. App. C4-C5.)

To the surprise of Petitioner, the government switched horses in mid-race by disavowing the 104(b) preponderance test

before this Court. It now argues that the better approach is that of the First Circuit in United States v D'Alora, supra--the evidence is admitted on the same basis as any other relevant evidence under Rule 403. In doing so, the government sidesteps Rule 104, discussing it only one time in its brief. Res. Br. 35. The government concedes at most that Rule 104(b) will "occasionally" come into play during the application of Rule 404(b). However, it does not equate the 104 (b) standard of proof of "evidence sufficient to support a finding of the fulfillment of the condition" with a preponderance of the evidence. It argues that 104(b) only requires the government to present sufficient evidence to "provide a basis from which the jury could conclude the defendant" was the person who committed the bad act. And it argues that the application

of this prerequisite test merely flows from the relevancy requirements of Rule 401.

Petitioner contended in his Brief on the Merits that Rule 104 applies whenever the issue, like here, is whether the bad act occurred, or whether the defendant committed it. Obviously, this issue arises during some, but certainly not a majority, of trials involving the proffer of similar acts. Rule 104 is not merely a part of the relevancy requirement of Rule 401. It is a codification of the long recognized division of fact-finding between judge and jury.

The government has argued that the plain language of Rule 404(b) supports its position that no prerequisite test applies here, citing this Court's recent decision in Bourjaily v United States, 483 US ____, 97 LEd2d 144 (1987). However, the plain language of Rule 104(a) makes clear that

"preliminary questions concerning . . . the admissability of evidence shall be determined by the court." This certainly includes the question of whether the prior bad act occurred and whether the defendant committed it. The decisions interpreting Rule 104, including Bourjaily, and the purpose behind the rule, also make clear that these preliminary questions must be proven by at least a preponderance of the evidence to the judge before the jury ever hears about the similar acts.

2. Petitioner has already extensively disussed the dichotomy between Rule 104(a) and (b), and the reasons he, along with Professor Wright and many other legal commentators, as well as the Seventh, Eighth, Ninth, and D.C. Circuits, think that the better policy is for the judge to conclusively decide whether the prior bad act occurred and the defendant committed it before considering whether its

probative value outweighs its prejudicial effect. Pet. Br. 26-27. The commentators have argued that this finding is mandated by Rule 104(a). The Circuit Courts of Appeals listed above nowhere mention the rule in applying the clear and convincing tests. It is either implicit in their opinions, or is intertwined in the application of probative/prejudice test.

Giving this prerequisite decision solely to the judge is consistent with the principles and purposes underlying Rule 104(a)--that jurors should not have the responsibility of applying evidentiary rules of a technical and exclusionary nature with a great potential for prejudice. Jurors will not appreciate the relevant policy concerns underlying Rule 404, will not assess the value of the evidence accurately, and will be unable to disregard the improperly admitted evidence in reaching these conclusions. See United

States v Byrd, 771 F.2d 215, 222 n. 4 (7th (Cir. 1985).

It is also consistent with the Advisory Committee Notes to Rule 404(b), which make the admission of bad acts evidence subject solely to an individualized determination by the trial judge. Note of Advisory Committe on Proposed Rules, 28 U.S.C. Rule 404, at 690-691.

The government's "any basis" test will allow the jury to hear about prior bad acts, even though there is not even a preponderance of the evidence that they occurred. The dangers of such evidence have long been recognized by all courts of this country, including this Court. See Boyd v United States, 142 U.S. 450 (1892); Hall v United States, 150 U.S. 76 (1893). Prior similar acts evidence is among the most prejudicial evidence which can be admitted at a trial, similar in effect to confessions, and prior criminal records

admitted under Rules 608 and 609. The obvious dangers are that the jury may regard the defendant as a bad person, the kind of person whose vocation is committing crimes, and to conclude that he must have done the crime he's charged with, even if the evidence is not so strong. Where the defendant has not been punished for the similar act, there is the natural desire for retribution to make sure he's punished for the "ones he got away with." A subtler result is the effect the prior acts have on the jury's assessment of the defendant's credibility. They may also have fewer scruples about making a wrong decision in their deliberations.

Rules 104(c) and 103(c) also support the conclusion that the judge, not the jury, should decide whether the prior acts occurred and whether the defendant committed them. They both provide that hearings on the question of admissibility

of possibly prejudicial evidence should be conducted out of the presence of the jury, whenever practicable. The Advisory Committee Notes to Rule 103(c) recognize that a "ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. Bruton v United States, 389 U.S. 818 (1968)." Notes of Advisory Committee on Proposed Rules, 28 U.S.C.App Rule 103.

This Court in Bruton recognized that in cases where the inadmissable evidence is highly prejudicial, cautionary instructions are ineffective. The government has not stated what sort of cautionary instruction should be given to the jury about bad acts evidence admitted under its any basis test.. Are they to be instructed that they should only consider this testimony if they find that the bad acts occurred and that the defendant committed them;

otherwise they are to ignore it? Are they to be instructed about a specific standard of proof to be applied in deciding whether the bad acts should be considered? Any cautionary instruction carries with it the gave risk of asking jurors to do what learned judges and legal counsel would have difficulty doing--applying what is essentially a de minimus civil evidentiary standard in a criminal trial to certain "subsidiary facts" all the while bearing in mind that every fact necessary to constitute the charged offense must be proven beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). The possibility of jury confusion, prosecutorial bootstrapping, and even due process violations are simply far too great to leave this decision up to the jury.

Finally, this Court's recent decision in Bourjaily v United States supports Petitioner's contention that this prere-

quisite question should be decided by the judge. This Court recognized that pursuant to Rule 104(a), the trial court should be making admissibility determinations that hinge on preliminary factual questions involving difficult evidentiary questions and highly prejudicial testimony. Ibid. at 97 LEd2d 152. However, this Court also resolved in Bourjaily that the standard of proof as to preliminary questions of fact of whether a conspiracy existed for the purposes of applying the hearsay rule under Rule 801(d)(2)(E) is by a preponderance of the evidence.

B. THE STANDARD OF PROOF FOR THE PRELIMINARY FINDINGS UNDER BOTH RULE 104(a) or (b) IS AT LEAST A PREPONDERANCE OF THE EVIDENCE.

1. Petitioner argued in his Brief on the Merits that the standard of proof under a Rule 104(a) determination as to prior bad acts should be by "clear and convincing evidence. Counsel thought that

the issue of the standard of proof under Rule 104(a) had not been decided. Pet. Br. 27, n. 19. Much to his chagrin, he was not aware of Bourjaly, supra, when he wrote the brief. This Court resolved the issue by holding that preliminary questions of fact under Rule 104(a) must be proven by the proponent by a preponderance of the evidence.

Thus, if this case is resolved under Rule 104(a), the Sixth Circuit was correct in using the preponderance of the evidence standard. However, for the reasons stated in Argument II of Petitioner's Brief on the Merits, the court was incorrect in its application of that standard.

2. The clear and convincing test could still be adopted by this Court, but it could only do so by first rejecting the argument that the prerequisite decision should be made by the judge pursuant to

Rule 104(a). The government itself rejects this argument, contending that no prerequisite decision need be made except in the "occ[illegible]al" case, and then it is to be made under Rule 104(b). Pet. Br. 35.

This Court could, in one of two ways, still find that the clear and convincing test should be adopted. First, it could find that it is the standard of proof under Rule 104(b). The Court in Bourjaily intimated no view on the proper standard of proof for questions of conditional relevancy under Rule 104(b).[4] Ibid., 97 LEd2d at 153, n. 1.

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[4] However, as Professor Wright points out, it is "nonsense" for the Beechum majority decision to make the question of whether the bad act occurred a "preliminary question" for the court under Rule 104(a), and to make the question of whether the defendant committed it a "preliminary fact" decision for the jury under Rule 104(b). 22 C. Wright and K. Graham, Federal Practice and Procedure: Evidence, Sec. 5249, Supp. 1987 at 552, n. 61.8). Both questions should be for the court because the prosecution is really trying to show not that the misconduct occurred, but that the defendant committed it.

The 104(b) standard-- "evidence to support a finding of the fulfillment of the condition"--could be higher for criminal cases than for civil ones. See E. Imwinklereid, Uncharged Misconduct Evidence, Sec. 2:08, at 22 (1984). In fact, even after Beechum, the Fifth Circuit has equated the Rule 104(b) standard with the test for withstanding a directed verdict. United States v Jimenez, 613 F.2d 1373, 1377 (5th Cir. 1980) ("the government need only produce evidence which would withstand a directed verdict on the extrinsic offense.") This Court has held that in a criminal case, due process requires that a judge grant a motion for a judgment of acquittal unless, viewing the evidence in a light most favorable to the prosecution, the evidence would justify a reasonable man in concluding that the elements of the crime were established beyond a reasonable doubt.

Jackson v Virginia, 443 U.S. 307 (1979). Surely this directed verdict standard is at least as high as "clear and convincing evidence."

Thus, if this Court rules that this case involves applying Rule 104(b), not Rule 104(a), it could find that in criminal cases, similar acts must be proved by at least clear and convincing evidence.

A second way of adopting the clear and convincing proof test is to find that it is contained in the probative/prejudice balancing that must occur under Rule 404(b). As was stated, the Seventh, Eighth, Ninth, and D.C. Circuits never explicitly found that the clear and convincing evidence standard was the burden of proof under Rule 104(a). See n. 2 and 3, ante. These courts of appeals could be applying the standard as part of the probative/prejudice balancing. At least

two commentatators, including Weinstein, advocate something similar--a sliding scale of proof, depending on the amount of prejudice inherent in admission of the prior misconduct. Ibid.

3. Every circuit court of appeals which has defined the 104(b) standard of proof has, at a minimum, equated it with a preponderance of evidence. See United States v Ingraham, supra at 235. As was stated, the Sixth Circuit did so below. See Pet. Br. 25, 31. This is consistent with the common sense meaning of "evidence sufficient to support a finding of the fulfillment of the condition." That phrase means at least 51% of the evidence (and according to the Fifth Circuit in Jiminez, supra, could mean substantially higher in a criminal case). Contrary to the indication in Petitioner's Brief that the First Circuit follows the government's "any basis" test, that is no longer the case. See United States v Ingraham,

supra. The First Circuit now has joined the Second, Fourth, Fifth, Sixth, and Eleventh Circuits in finding that Rules 104(a) and 104(b) require that similar acts be proven by a proponderance of the evidence before the probative/prejudice balancing occurs.

C. THE GOVERNMENT'S NOVEL "ANY" BASIS TEST HAS NO SUPPORT IN THE FEDERAL RULES, IN CURRENT FEDERAL LAW, IN FEDERAL COMMON LAW, IN THIS COURT'S DECISIONS, NOR IN POLICY CONSIDERATIONS.

1. The primary problem with the government's position from a Rules standpoint is that it ignores Rule 104. Perhaps this is why the government did not emphasize in its brief this Court's recent decision in Bourjaily. It cited it, but surprisingly did not argue that Petitioner was wrong in his contention that the standard of proof under Rule 104(a) could be "clear and convincing." Maybe the government was thinking that it would be consistent with

the Bourjaily decision for this Court to find that preliminary factual questions relating to the commission of similar acts should be decided under the same 104(a) standard. This obviously would be contrary to the government's position.

2. The government also did not cite Ingraham, supra, in its brief. Perhaps it was unaware of it, like this writer was of Bourjaily. With Ingraham goes any support for the government's position by any Circuit Court of Appeals.

3. The government argued that the "clear and convincing" test has a dubious pedigree. Petitioner disagrees, contending that it is consistent with and in response to the federal common law rule that similar acts testimony was greatly disfavored, and that it could only be admitted when it fell into tightly defined categories. See Reed, The Development of

the Propensity Rule in Federal Criminal Causes 1840-1975, 51 U.Cin.L.Rev. 299, 303-304 (1982). The government seems to imply that the federal common law, including nineteenth century decisions of this Court, support the English common law "inclusionary" approach to similar acts evidence. This approach was championed in this century by Professor Stone. Res. Br. 24-28.

However, a close reading of the Supreme Court cases cited by the government show that this Court also followed the tightly defined, exclusionary approach.[5] This approach was strongly

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[5] Boyd v United States, 142 U.S. 450, 458 is particularly supportive of this contention. This Court reversed the defendants' felony murder convictions because the government introduced evidence of prior armed robberies committed by the defendants, despite the fact that the defense was self-defense in the face of the prosecution's contention that the victims were attempting to foil a robbery. Under any application of the present Federal Rules of Evidence, evidence of the prior robberies would today be admitted.
(Continued on following page)

supported by the great Dean Wigmore. 1 J. Wigmore, Evidence 616 (2d ed. 1923). The only federal courts which espoused an inclusionary approach prior to the adoption of the Federal Rules were the Second and Tenth Circuits. And even they, like the Circuit Courts of Appeals today, required that the prior acts be proven by a preponderance of the evidence before the trial court considered the probative/prejudice question. See Reed, supra at 303-304, n. 38-39. Thus, the government's "any basis" test has no pedigree whatsoever.

(Continued from previous page)

Lisenba v California, 314 U.S. 219, 227 (1941) is also not supportive of the government's contention. The Court merely upheld a California Supreme Court application of its similar acts laws. A close reading of the California decision shows that the jury was instructed that they could consider the allegations of a prior similar murder for insurance only if they found beyond a reasonable doubt that the defendant had committed a prior murder. 89 P.2d 39, 52 (1939).

4. The government contends that the clear and convincing test is contrary to sound policy because it sometimes excludes obviously admissable evidence. Res. Br. 29-30. The government's argument is specious. Neither the clear and convincing test nor the preponderance test would exclude the sort of "serial" evidence in the government hypothetical. There is nothing under either test that prevents the trial court from properly infering from such evidence that the defendant committed the prior acts. See, e.g., United States v Woods, 484 F.2d 127 (4th Cir. 1973); and People v Wayne Williams, No. 39631 (Ga. Dec. 5, 1983) (the classic serial acts similar acts case).

The government also argues that the clear and convincing test sometimes causes inadmissible evidence to be admitted because the court focuses on the strength of

the proof showing that the misconduct occurred, rather than on the probative force of it versus the prejudicial effect. This would only occur if the trial court, like the government on p. 30 of its Brief, somehow forgets that the clear and convincing and preponderance tests are prerequisite tests which must be applied before and in addition to the probative/prejudice balancing. The proper analysis is as follows:

1. Is the similar act being introduced for a proper purpose-- not to show propensity, but rather to show one of the exceptions under Rule 404(b)?

2. Is that exception, e.g., knowledge, at issue?

3. Can the government show that the prior bad act was committed and that the defendant committed it by the applicable standard of proof (either by clear and convincing evidence, or a preponderance of the evidence)?

4. Does the probative value of such evidence outweigh its prejudicial effect on the defendant?

All of these questions must be answered in the affirmative by the trial judge, or the

evidence is kept from the jury.

The purpose behind the third part of the test is to make sure that the jury hears typically highly prejudicial evidence only when the government can show by at least 51% of the evidence that the prior bad act occurred, and that the defendant committed it. Otherwise, it has insufficient probative value to be considered for admission.

The government argues that its "any basis" test provides adequate safeguards against the misuse of similar acts evidence. Petitioner will not reiterate his myriad of arguments refuting this. It is sufficient to say that under the "any basis" test, the government can submit with ease flimsy prior misconduct evidence because it has only to show that there is any basis for finding that the misconduct occurred and the defendant

committed it. According to the government, all it has to show is that the prejudicial effect does not substantially outweigh the probative value under Rule 403. Under such a test, evidence of the televisions in this case can be admitted even though the government still cannot show that they were stolen.

D. THE GOVERNMENT'S ALTERNATE ARGUMENT THAT EVIDENCE OF THE TELEVISIONS WAS PROPERLY ADMITTED AS BEING PART OF THE RES GESTAE IS NOT PROPERLY BEFORE THIS COURT. IF THIS COURT CONSIDERS IT, IT IS WITHOUT MERIT.

Throughout the proceedings, the government has consistently claimed that it was proper to introduce evidence of the sale of the televisions because the televisions were stolen, i.e., they showed a consistent pattern of <u>illegal</u> conduct on the part of Mr. Huddleston. The government argued this at trial. (J.A. 7; R. 380; 383-389). They argued this on appeal to the Sixth Circuit. (Government's Peti-

tion for Rehearing, p. 9). Now for the very first time, the government presents a fall back position--it argues that even if the televisions were not stolen, Petitioner's dealings with them were admissable as part of the res gestae. (Res. Br. 37-38). According to this new position, such testimony was necessary to rebut the suggestion that Petitioner's dealings with Wesby were limited. It was necessary to show Petitioner's ongoing activity in the "informal" merchandising of products, as opposed to the illegal merchandising of products.

Petitioner contends that this new argument violates this Court's Rule against changing the substance of the questions set forth in the petition for certiorari. Supreme Court Rule 34(a). The question upon which certiorari was granted was what should be the standard under the Federal Rules of Evidence for

admitting prior bad acts--must the district court find that the acts have been proved by clear and convincing evidence, or by a preponderance of the evidence.

Under the the government's fallback argument, it is not necessary to reach the similar acts issue. If this argument had been presented to the Sixth Circuit, and that Court had relied on it to affirm the conviction, this case would never be before this Court.

Under Rule 34(a), Petitioner asks this Court not to consider this argument. However, Petitioner recognizes that this Court in its discretion may consider it. See Vance v Terrazas, 444 U.S. 252, 258 n. 5. If this Court so chooses, Petitioner contends that the argument is devoid of merit for the reasons stated in Argument II in his Brief on the Merits. (Pet. Br. 4[illegible]-44). Petitioner's dealings with Mr.

Wesby concerning the televisions only came to light because he was forced to testify about them as a result of the trial court's erroneous admission of Mr. Toney's testimony. It must be remembered that Mr. Toney had nothing at all to say about Leroy Wesby. Mr. Toney never claimed that Guy Huddleston ever mentioned Mr. Wesby.

Mr. Huddleston wanted to try the case on the question of his knowledge of the tapes. As a result of the trial court's erroneous ruling on similar acts, well over half the trial was instead tried on the issue as to his knowledge concerning other transactions. Mr. Toney's testimony concerning the televisions was not probative because the televisions were not shown to be stolen. It was therefore erroneous to admit this evidence.

CONCLUSION

The judgment of conviction should be reversed, and the case should be remanded for a new trial.

Dated: March 7, 1988 Respectfully submitted,

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